# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1970

No. ~~939~~ 70-34

SIERRA CLUB, a California corporation, *Petitioner*

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
*Respondents*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONER

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## Subject Index

## Table of Authorities

## Constitutions



## Statutes

## Opinions



## Miscellaneous

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## BRIEF FOR PETITIONER

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (A. 208-235) is reported at 433 F.2d 24. The memorandum of decision of the United States District Court for the Northern District of California (A. 186-199) has not been reported.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 16, 1970. On October 6, 1970, the Court of Appeals signed an order staying issuance of its mandate pending filing, consideration and disposition of the petition for certiorari, provided that the petition be filed on or before November 6, 1970. The petition was filed on November 5, 1970, and was granted on February 22, 1971. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

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## STATUTES INVOLVED

The provisions of law involved are:

Article IV, Section 3, Clause 2, Constitution of the United States;

Administrative Procedure Act as amended by Pub. Law 89-554, 80 Stat. 381 et seq., 5 U.S.C. §§ 551(5), 553, 701-706;

Conservation Code, 16 U.S.C. §§1, 5, 8, 41, 45c, 79, 497, 528-531, 551 and 688, codifying 39 Stat. 535, 48 Stat. 389; 36 Stat. 1253, 66 Stat. 95; 43 Stat. 90; 26 Stat. 478; 44 Stat. 820; 54 Stat. 43; 70 Stat. 708; 74 Stat. 215; 30 Stat. 35, 76 Stat. 1157, 78 Stat. 745; 62 Stat. 861;

Highway Code, as amended by Pub. Law 90-495, 82 Stat. 823, 23 U.S.C. §138;

Territories and Insular Possessions Code, 48 U.S.C. §341, codifying 62 Stat. 100;

Transportation Code, as amended by Pub. Law 90-495, 82 Stat. 824, 49 U.S.C. §1653(f);

United States Forest Service Manual, §§2711.2-1 (now §2711.1-3), 2711.2-5 (October 1968 Amendment No. 12; now 2711.1-4), 2716.3;

Federal Register, 34 Fed. Reg. 19 (Rules for Roadbuilding in National Parks, F. R. Doc. 69-1177, January 28, 1969), 34 Fed. Reg. 6985 (Revocation of Procedures for Roadbuilding in National Parks, April 26, 1969);

These provisions are set out in the Brief Appendix (B.A.).

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## QUESTIONS PRESENTED

1. Does the Sierra Club, a conservation organization with a special interest in the Sierra Nevada Mountains, have standing to sue to prevent federal officials from illegally authorizing acts which would produce serious and permanent damage in Sequoia National Park and Sequoia National Game Refuge, both located in the Sierra Nevada Mountains?

2. Must a conservation organization show threatened damage to its tangible interests and not merely damage to the aesthetic, recreational or conservational interests of its members and others in order to have standing?

3. Where irreparable harm is inevitable if a preliminary injunction is not granted, must the plaintiff prove a "reasonable certainty" of prevailing, or is it enough to raise serious and substantial questions going to the merits?

4. May the Secretary of Agriculture circumvent Congress' 80 acre limitation on long-term permits for recreational use of national forest land by coupling a permit for 80 acres with a second permit for facilities occupying additional acreage, where the supplementary permit is revocable neither in fact nor in law?

5. May the Secretary of the Interior authorize others to construct a major connecting-link highway across Sequoia National Park for a non-park purpose?

6. May the Secretary of the Interior lawfully disregard his own rule requiring him to conduct public hearings on proposed park roads?

7. May a statute requiring Congressional approval of any transmission line located in Sequoia National Park be ignored by the Secretary of the Interior?

8. May the Secretary of Agriculture authorize a huge private resort development in a Congressionally-established Game Refuge when that use contravenes the express purposes of the Refuge?

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**STATEMENT**

The Sierra Club is a nonprofit corporation with a growing national membership. It had approximately 78,000 members when the complaint in this matter was filed on June 5, 1969, of whom approximately 27,000 lived in the San Francisco Bay Area (A. 4). One of the Sierra Club's principal purposes is the conservation and protection of the natural resources of the Sierra Nevada Mountains *(Ibid)*.

"Environmental Quality", the first Annual Report of the Council on Environmental Quality transmitted to the Congress in August, 1970 by President Nixon, lists the Sierra Club prominently among organizations which ". . . exist to inform, guide, or represent their members in a wide variety of environmental and conservation matters." (*Id.* at 215.)

The Second Circuit has described the Sierra Club as a "national conservation organization with substantial membership . . . and a history of involvement in the preservation of national scenic and recreational resources." See *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 103 (1970).

The Sierra Club was aware of the possibility of Forest Service plans for the development of Mineral King in the 1940's (A. 41-45). Consultation between the Sierra Club and the Forest Service about the future of Mineral King took place at intervals over the years (A. 47). The Club became alarmed in 1965 when, for the first time, the Secretaries of Agriculture and Interior and their aides began to consider seriously a massive development along the lines ultimately proposed by Walt Disney Productions, Inc. ("Disney") (A. 26-27, 41-45). It was obvious that a development of that magnitude would have a catastrophic impact on an area which Disney's literature has justly described as a "High Sierra wonderland" which is "unsurpassed in natural splendor" (A. 53a).

In June of 1965, Dr. William E. Siri of the Sierra Club wrote to the Forest Service outlining action taken by the Sierra Club's Board of Directors on May 1-2, 1965. On July 1, 1965, the Forest Service replied denying his re-

quest for a hearing on the Mineral King project (A. 47-48).

In 1965, the Sierra Club also appointed J. Michael McCloskey, a member of its staff familiar with Mineral King and the development proposal, to act as one of its spokesmen. He again requested public hearings on the subject (A. 41-46). The requests were denied (A. 26).

As a necessary adjunct to the proposed Disney development in Mineral King, the State of California proposed to build a new road described as a "freeway" through Sequoia National Park (A. 56, 57). The Kern-Kaweah Chapter of the Sierra Club opposed that project at a hearing held by the State (A. 70).

Subsequently, when it became apparent that hearings would not be held by respondents (the responsible *federal* officials) and that the Disney proposal, together with all of its ramifications (high-voltage transmission lines, freeway, sewage treatment plant, parking structure, etc.) was to be approved, the Sierra Club filed this lawsuit for declaratory relief and to enjoin the Secretaries and their aides from issuing the requisite permits.

The complaint in the case alleges, *inter alia*, the Sierra Club's interest in the preservation of the Sierra Nevada Mountains, the destruction of aesthetic and conservational values which would result from the proposed Mineral King project, and the illegality of the Secretaries' proposed action in approving it (A. 3-11).

The jurisdiction of the District Court was invoked under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706, the Federal Question Statute, 28

U.S.C. §1331(a), the 1962 Mandamus Act, 28 U.S.C. §1361 and the Declaratory Judgment Act, 28 U.S.C. §2201 (A. 3). Jurisdiction of the Ninth Circuit was based upon 28 U.S.C. §1292(a)(1) (A. 209).

There is no suggestion in the record that the Club did not fully exhaust its administrative remedies prior to filing the suit; or that the controversy was not "ripe"; or that the Sierra Club will not vigorously and adequately present its position that the Secretaries are acting in excess of their statutory powers.

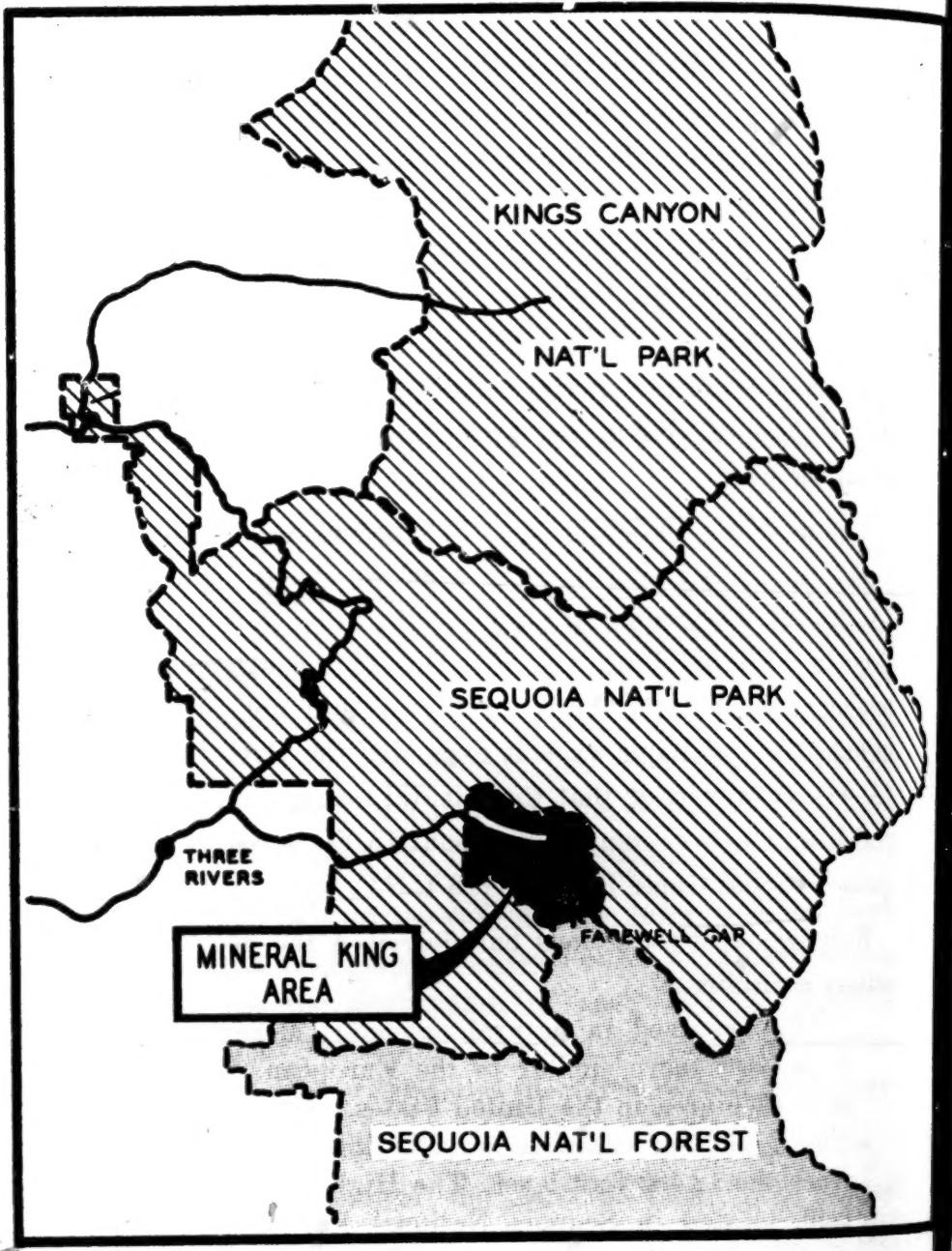
To understand the special legislation which controls the use of Mineral King, one must understand something about the area.

Mineral King Valley is in a U-shaped basin rimmed by 12,000 ft. peaks rising 3,000 to 4,000 ft. above the valley (A. 32, 42). Geographically and ecologically, it is part of Sequoia National Park (A. 26). Due to the existence of mining claims in the Valley, Congress did not formally include Mineral King when it expanded the Park in 1926 (A. 42). However, at that time, it did designate the Mineral King enclave, comprising about 15,000 acres, as "Sequoia National Game Refuge" (16 U.S.C. §688; A. 26, 42).

Walt Disney Productions has described the geographic setting as follows:

> "Unsurpassed in natural splendor, Mineral King is perhaps more similar to the European Alps than any other area in the United States. Altitudes range from 7,800-foot valley to surrounding mountains that reach the 12,400 foot level. The High Sierra wonderland, located in Sequoia National Forest, is generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas" (A. 53a).

The accompanying drawing was prepared from the record to help place Mineral King geographically.



In February, 1965, the Forest Service of the United States, Department of Agriculture, with administrative responsibility for the National Forests, issued a prospectus for a proposed winter and summer recreational development at Mineral King. Minimum facilities contemplated by this prospectus were relatively modest. The prospectus solicited bids from private developers for the construction and operation of a year-round recreation resort (A. 26-27).

In December 1965, without hearings, the Forest Service selected from the six bids received the proposal of Disney for a much more massive resort, designed principally as a ski resort but for summer use as well (A. 27). In January 1966, the supervisor of the Sequoia National Forest granted Disney a three-year preliminary permit (A. 27, 49-52). The permit authorized surveys and plans. It also provided that a thirty-year term special use permit covering not to exceed 80 acres and a supplemental "annual" or "revocable" special use permit for the development and operation of Mineral King would be issued, prior to the expiration of the preliminary permit, if certain conditions were met. The conditions were that the plans as submitted had been approved, that a contract had been awarded for a significant part of the necessary all-season road, and that funds had been programmed for completion of the road within a specified time (A. 27, 51).

While the prospectus had solicited a private expenditure of some $3 million Disney planned to spend $35.3 million to develop Mineral King. While the solicitation was for a facility including four ski lifts and resort accommodations for 100 skiers, Disney's proposal includes

a village incorporating major hotels and lodges for over 3,310 overnight guests, 10 restaurants, a chapel, theatre, general store, five story parking facility, hospital and sewage treatment facilities (A. 27, 53a-c). Other facilities would include power plants, and associated installations, swimming and ice skating facilities, 20 ski lifts, a cog-assisted railroad, avalanche dams and stream control features, and a development scheme which would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most ski slopes (A. 32, 53a-c).

The record before the District Court showed that Disney could *not* locate all major and indispensable components of the development within the 80 acres covered by the term permit. While neither the Forest Service nor Disney has been willing to reveal any details, the record established, the District Court found and the Ninth Circuit accepted, that major facilities, including ski lifts, towers, sewage treatment facilities and parking structures were to be located on land covered by the supplemental permit (A. 15, 23, 31, 188, 229). This does not include the bulldozed and blasted ski slopes which also would be outside the acreage limitation.

The projected daily use of Mineral King by as many as 14,000 persons (A. 143) would produce nearly twice the concentration of persons found in Yosemite Valley on busy days (A. 28).

Mineral King presently is reached by a low-standard road from Hammond, California constructed to support the mining activities of the 1870s. In the course of its

twenty-six mile route from the west, it traverses a portion of the later-established Sequoia National Park (16 U.S.C. §41). Agriculture's plan assumes a new highway which would open the way to larger numbers of Disney's paying customers (A. 28, 58, 60, 65).

The proposed plan for a freeway across Sequoia National Park calls for two lanes with frequent passing lanes (A. 61). However, the record shows that there is reason to believe that this capacity will prove inadequate. Then Secretary of the Interior Udall said in a letter to then Secretary of Agriculture Freeman in 1968:

> "In addition to our desire to minimize the damage to park values by this road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two-lane road of park standards be adequate, or will Interior later receive a request for another road?" (A. 136).

Interior Consultant John Clarkeson said:

> "Unless some control or other means is considered, this two-lane road does not look at all adequate for a 14,000-a-day visitor load where so many will be one-day visitors." (A. 157).

Even in its two-lane configuration, the freeway in the mountainous area would include "extensive cutting and filling . . . accompanied by extreme back slopes and embankment slopes to accomplish a stable earthwork condition. . . . [E]mbankments as much as 600 feet and 700 feet wide at the bottom of the prism are required to hold up a mere 28 feet for highway width." (A. 150, 151). The fragile nature of the area through which the highway would pass guarantees that the scars produced would be very slow to heal (A. 90, 142).

As of October 24, 1967, the State of California had committed $22 million for the construction of the freeway which would dead-end at Mineral King (A. 29). The Secretary of the Interior originally opposed the section of the freeway which would cut across Sequoia National Park and urged that a better alternative be found (A. 65-67). He later acquiesced in its location within the Park only reluctantly (A. 139).

On January 27, 1969, the Secretary of Agriculture, through his Forest Service aides, approved Disney's plan and stated that a thirty-year term permit for 80 acres of game refuge and an accompanying permit for the additional acreage would issue automatically upon execution by the State of California of the first contract for construction of a significant portion of the freeway (A. 28). Soon after, without public hearings, Interior threatened to issue the freeway permit to the State (A. 29). That would have set the entire project in motion (A. 28). A high-voltage power transmission line across the Park (without Congressional approval) was also contemplated (A. 40). At this stage, the Sierra Club sought a preliminary injunction.

District Judge William T. Sweigert probed these matters in the course of two days of hearings and found that the Club had raised serious and substantial questions concerning the statutory authority of the defendants to permit the threatened massive alterations of Sequoia National Park and Sequoia National Game Refuge (A. 199). He found that there was an imminent threat of irreparable harm and that preservation of the *status quo* required issuance of a preliminary injunction (A. 198).

The Court of Appeals disagreed. It held that the Sierra Club lacked standing to prosecute this lawsuit. It also held that the Secretaries had acted properly and that the Sierra Club had shown no threat of irreparable injury to itself or anyone else arising from the Secretaries' proposed action (A. 208-235).

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## SUMMARY OF ARGUMENT

**A. Introduction.**

The Secretaries of Agriculture and of the Interior threatened to authorize a massive recreational development, a freeway and a high-voltage power transmission line in Sequoia National Park and Sequoia National Game Refuge. The Sierra Club sought and obtained a preliminary injunction barring construction on the ground that the project was illegal in a number of particulars. The Ninth Circuit erred in reversing.

**B. Standing.**

The Sierra Club is one of the oldest, largest, and most respected conservation organizations in America. Its conservational interests and efforts have been focused upon the Sierra Nevada Mountains, including Sequoia National Park and Sequoia National Game Refuge. Although the Ninth Circuit has purported to give consideration to "conservational, recreational or aesthetic interests" as a basis for standing, it has denied the Sierra Club standing here. It has, in fact, erroneously insisted upon a showing of tangible injury as a prerequisite to standing.

Although the Ninth Circuit did not in terms deny that a membership organization could have standing, that denial is confirmed in its subsequent decision in *Alameda Conservation Association v. State of California,* No. 22961, ..... F.2d ..... (9th Cir. Jan. 19, 1971). Its position conflicts with decisions of this Court and better considered decisions of other circuits.

Construing the Administrative Procedure Act, and its application to this case, the Ninth Circuit has taken a narrow, negative view, in conflict with the decisions of this Court, especially *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967).

In conservation cases, the choice which the reviewing court makes on the issue of standing very often determines whether or not unlawful administrative action will be tested or will remain untested for lack of a party competent to seek judicial review. This is the role of the "private Attorney General."

On this record, Judge Sweigert was right in finding that the Sierra Club had standing to seek judicial review.

**C. Preliminary Injunction Standard.**

The huge Disney project in Sequoia National Game Refuge and the related freeway across Sequoia National Park would have caused massive, irreversible ecological damage—i.e. irreparable injury—unless enjoined *pendente lite.* This meant that the District Court was required to find only that the Club had raised "serious, substantial, difficult and doubtful" questions (*Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953)) rather than a "reasonable certainty" of success on the

merits. The Ninth Circuit erroneously applied the "reasonable certainty" test.

**D. Merits.**

The administrative decisions here in issue must be given thorough, probing, in-depth judicial review. *Citizens to Preserve Overton Park v. Volpe,* 39 U.S.L. Week 4287, 4291 (U.S. March 2, 1971). Judge Sweigert did that. The Ninth Circuit did not. It erred in its easy acquiescence in administrative decisions which were not only an abuse of discretion but beyond the outer limits of any delegation of power by Congress.

**1. National Forest Acreage Limit.**

Congress, in 16 U.S.C. §497, declared that long-term recreational developments on national forest land must be limited to 80 acres. The Secretary of Agriculture may not circumvent that limitation when some of the indispensable permanent facilities of a proposed huge private recreational development on such land will not fit within 80 acres, by permitting them to spill over onto additional land covered by a second "supplementary" permit. The Secretary's power to make rules and regulations for the national forests is no authority for the second permit because it supports only permits truly revocable at will.

Combinations of permits employed for other recreational developments do not justify the tactic employed here. Existing permits disclose a spectrum of practice ranging from complete respect for the 80 acre limit to complete disrespect. Congress has not ratified the disrespect.

**2. Game Refuge.**

Congress omitted Mineral King from Sequoia National Park only because of minor prospecting activity. It did designate the area as the Sequoia National Game Refuge in order ". . . to protect from trespass the public lands of the United States and the game animals which may be thereon . . ." 16 U.S.C. §688. Congress authorized only those uses consistent with these purposes.

Agriculture could not find that Disney's massive resort complex is a consistent use without being arbitrary, capricious and abusing its discretion.

**3. Park Highway.**

Interior is powerless to approve a State of California freeway across Sequoia National Park designed to serve as a connecting link between Mineral King and the State highway system. The Secretary's authority to alter national parks is limited to those changes which serve a park purpose. 16 U.S.C. §1.

The park route to Mineral King is also illegal because it was selected not as the only possible route but as the shortest and cheapest alternative.

An old road in existence before the area it traverses was incorporated into the Park does not render any new highway crossing the Park "legal" simply because the two would have termini in common.

**4. Highway Hearings.**

The Secretary of the Interior failed to revoke his own regulation requiring public hearings in the case of roads with "substantial social, economic or environmen-

tal effect". Therefore, the threatened freeway across the Sequoia National Park also is illegal because the Secretary failed to conduct a hearing before deciding to issue a permit for the highway.

**5. Transmission Line Across the Park.**

The Secretary of the Interior could not lawfully approve a high-voltage transmission line across Sequoia National Park because 16 U.S.C. §45(c) requires the approval of transmission lines in that Park by Congress. Since the line was intended to serve Disney's Mineral King development outside the Park, rather than a park purpose, the Secretary also was barred by the generally applicable provisions of 16 U.S.C. §1.

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## ARGUMENT

### I. THE NINTH CIRCUIT'S DECISION ON STANDING WAS ERRONEOUS AND MUST BE REVERSED

The Ninth Circuit reversed this case at the threshold, on the ground that the Sierra Club lacks standing to sue. That holding would dispose of the case in its entirety. It is, however, wrong, and must be reversed.

#### A. The Facts Show the Sierra Club's Interest In the Matters At Issue in this Case.

As pleaded, as noted by the District Court, and as fully supported by the record herein:

> "For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of per-

> sons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants. . . ."
>
> (Complaint, para. 3, referred to in Judge Sweigert's opinion, A. 4, 197.)

The Sierra Club's complaint goes on to allege the threat to conservational, recreational and aesthetic values in the Mineral King Valley posed by respondents' unlawful plans for Sequoia National Game Refuge (Mineral King) and Sequoia National Park.

The affidavits and exhibits comprising the record in this case show in detail the nature of the planned development and the grounds for the Sierra Club's objections. Those matters are discussed, *infra,* in the portion of this brief dealing with the merits of the controversy. For the purpose of this discussion of standing, they need not be set forth in detail in this section. It is sufficient that the Sierra Club has alleged its interest in the preservation of conservational, recreational and aesthetic values of Mineral King and Sequoia Park and that it has alleged that construction plans approved by the Secretaries of Agriculture and Interior threaten those interests.

The Ninth Circuit held that the Sierra Club lacked sufficient interest to challenge the Secretaries' unlawful activities. As we shall demonstrate, the Ninth Circuit was wrong on a number of grounds.

**B. Standing for Conservation Organizations is Critically Important to America.**

The standing issue has particular significance for cases involving the environment. Whether the issue is one of public health (such as air, water, or noise pollution), or of conservation (such as the preservation of parks, game refuges, wilderness areas and other sanctuaries of natural beauty) the standing issue is the same. In each instance, administrative action has wide-ranging effects important to the whole society. In each instance, also, well-financed, well-organized private interests are arrayed against broader but less specific interests of the defenseless and unorganized population at large. In these circumstances, it is unlikely that lawless administrative action will be judicially reviewed and corrected unless at the behest of some organization acting as "private Attorney General."

If our nation is to function in the manner contemplated by its Constitution, the mandate of the legislative branch must be followed by the executive branch and the judicial branch must oversee its proper execution. The federal judiciary should not abdicate its responsibility by denying standing to the only private plaintiffs likely to frame and present the issues to the Court.

While the law of standing has advanced fast and far along a broad front, this development is particularly significant to what has been termed "the quality of our lives." See: *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (D.C. Cir. 1970); *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970); *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965). Cf. *Alameda Conservation*

*Association v. State of California,* ..... F.2d ..... (9th Cir., Jan. 19, 1971), No. 22961. See also remarks of Robert W. Ginnane, General Counsel, ICC, published in 20 ABA Admin. L. Rev. 149 (1969).

**C. The Ninth Circuit has Misconstrued "Aggrievement" as it Relates to Standing.**

The Ninth Circuit's opinion says that standing may be grounded upon "aesthetic, conservational and recreational" interests. It further states that the proposed Mineral King development and the related road and power transmission line are "personally displeasing or distasteful" to the Sierra Club and its members. Then, in a masterpiece of irreconcilable inconsistency, it concludes that the Sierra Club is not aggrieved or adversely affected "within the meaning of the rules of standing." It cites Black's Law Dictionary for a definition of "aggrieved" (A. 223).

The Ninth Circuit should have consulted a dictionary for the meaning of the word "aesthetic" and might better have consulted the many cases on the subject (rather than Black's Law Dictionary) for a definition of the word "aggrieved."

As far as aesthetics are concerned, the enormous impact of this huge project upon the "matchless mountain vistas" of the Mineral King area is obvious from the record. Disney may think that freeways, power lines, "manicuring and grooming" of ski slopes, towers, lifts, debris dams, and well over 80 acres of hotels, restaurants, parking structures and sewage treatment plants will make Mineral King more beautiful than ever. The Sierra Club vigorously disagrees. It is interested in preserving the

natural beauty of Mineral King, not in artificial "beauty" superimposed upon Mineral King by the hand of man.

Leaving aesthetics aside, the proposed Mineral King project and the freeway across Sequoia Park will undeniably have potentially serious adverse effects upon the park landscape. Even the limited record made in this case on the issue of a preliminary injunction is replete with evidence of the fragility of this high mountain valley, and the predictable erosion and scarring which the project will cause (A. 28-158 passim).

As far as the issue of standing is concerned, the question is not whether the Sierra Club's views on conservation and aesthetics are correct. The question is whether the Club as a litigant will vigorously assert interests adverse to the Secretaries, whose actions are being challenged. See *Barlow v. Collins,* 397 U.S. 159, 164 (1970); *Association of Data Processing Organizations v. Camp,* 397 U.S. 150, 151-152 (1970); *Flast v. Cohen,* 392 U.S. 83, 99 (1968).

But, notwithstanding its ritual recital of the "aesthetic, conservational or recreational" language from *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), the Ninth Circuit has trouble believing that one can be "adversely affected or aggrieved" absent some essentially economic interest. The Ninth Circuit highlights the economic interest of successful plaintiffs in many of the recent cases on standing (A. 218-221).

It also suggests that the Sierra Club would have standing if it had a cabin in the Mineral King valley which would be razed to make room for the Disney project (A. 219). It rejects, however, the idea that the Sierra

Club might have standing as a "private Attorney General" to assert aesthetic, conservational or recreational interests of its members (A. 224, f.n. 9).

The conflict between the Ninth Circuit's decision in this case and the Second Circuit's decision in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 102 (1970) is, of course, clear. The Second Circuit has recognized the Sierra Club's legally protectable interest in the aesthetic, conservational and recreational aspects of the Hudson River Valley; the Ninth Circuit has refused to recognize the Sierra Club's conceptually indistinguishable interest in a Game Refuge and contiguous national park in the mountains from which the Sierra Club takes its name.

As the Second Circuit correctly pointed out in *Citizens Committee v. Volpe,* supra, "aggrieved" means the same thing whether the complainant is complaining about the actions of agencies such as the Federal Power Commission and Federal Communications Commission (governed by statutes with self-contained judicial review provisions),[1] or the actions of agencies governed solely by the judicial review provisions of the APA.

The Second Circuit reaches that conclusion by the simplest and most direct route:

> "We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as re-

[1] Cf. *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965)

sponsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." (425 F.2d at 105).

The vice of the Ninth Circuit's contrary rule is seen most clearly when it is applied to a wilderness area threatened by unauthorized commercial exploitation. In such a case, who will have standing to complain if not some conservation organization? By definition, in a wilderness there are no cabin owners and no local residents to protest if the responsible officials bow to sharply focused economic pressures and betray their trust to future generations. And yet, under the Ninth Circuit's rule, no one would have standing to protest.

Clearly, the Second Circuit's rule is correct and the Ninth Circuit's rule in error.

**D. The Administrative Procedure Act Provides the "Statutory Aid" to Standing, If Any Is Required.**

The Ninth Circuit erred when it attempted to distinguish *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965) cert. denied 384 U.S. 941 (1966), on the ground that "Section 313(b) of the [Federal Power] Act specifically grants to a party aggrieved by an order of the Commission the right of review by the United States courts of appeals. There is no such statute involved in the present case to give standing" (A. 218)

As Professor Davis points out in his recent article "The Liberalized Law of Standing," 37 U. Chi. L. Rev. 450, 465-467 (1970), the Ninth Circuit's approach is wrong. Some earlier cases have suggested that Section

10(a) of the Administrative Procedure Act (5 USC §702 Supp. II, 1967), which affords judicial review to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" could only come into play when the "adversely affected or aggrieved" language was repeated in some fashion in the specific statute in issue (such as the Federal Power Act in *Scenic Hudson,* supra).

Cases requiring "further assurances" that the APA meant what it said with regard to the particular industry in question, rests upon a misunderstanding of legislative history of the APA.[2] This line of cases came to an end with *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970). In that case, the Eighth Circuit had concluded that "[u]nless a relevant statute provides for a 'party in interest' to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a 'private attorney general' to represent the public interest." *Association of Data Processing Service Organizations, Inc. v. Camp,* 406 F.2d 837, 843 (8th Cir. 1969). This Court reversed, stating:

> "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (397 U.S. at 153).

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[2] *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C. Cir. 1970); Davis, *The Liberalized Law of Standing, supra.*

Similarly, in *Barlow v. Collins,* 397 U.S. 159 (1970), involving the Food and Agriculture Act of 1965, there was no provision of that Act which gave petitioners standing to challenge the administrative regulation at issue. The Fifth Circuit had denied standing, *Barlow v. Collins,* 398 F.2d 398 (5th Cir. 1968), stating that "a policy of protecting a class of persons does not, without more, grant a legal right to those persons to enforce the policy." (398 F.2d at 401.) In reversing, this Court said "the legislative history of the 'making a crop' provision, though sparse, similarly indicates a congressional intent to benefit the tenants. They are persons 'aggrieved by agency action within the meaning of the relevant statute' as those words are used in 5 U.S.C. §702 (1964 Ed., Supp. IV)." (397 U.S. at 164-165.)

The First Circuit decision in *Arnold Tours, Inc. v. Camp,* 408 F.2d 1147 (1st Cir., 1969), also took the restrictive view of the APA, but was reversed here, on the basis of *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150. See *Arnold Tours, Inc. v. Camp,* ..... U.S. ....., 27 L.Ed.2d 179 (1970).

In *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), the Second Circuit correctly interpreted these cases to extend standing to the Sierra Club although the Rivers and Harbors Act, under which the case arose, contained no review provisions (425 F.2d at 104).

Notwithstanding these guiding decisions, the Ninth Circuit's majority concluded that, absent some review provisions in the statutes here in issue, the Sierra Club could

not have standing as private Attorney General to defend Mineral King. Obviously, it erred.

**E. The Ninth Circuit Erred in Denying the Sierra Club Standing because it is a "Group."**

In this case, the Ninth Circuit has attempted to distinguish two prior decisions expressly holding that the Sierra Club has standing to sue: *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), and *Parker v. United States,* 307 F.Supp. 685 (D. Colo. 1969). The Ninth Circuit says:

> "In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action." (A. 224).

The Ninth Circuit's subsequent decision in *Alameda Conservation Association v. State of California,* ..... F.2d ..... (9th Cir., Jan. 19, 1971), No. 22,966, demonstrates that it was not serious about this distinction. It is now apparent that, under the Ninth Circuit rule, a conservation organization does not have standing *as a representative of the interest of its members* even though it is joined with others as plaintiffs and those others *do* have standing.

In *Alameda Conservation Association* there were three groups of plaintiffs:

1. The Alameda Conservation Association, which was denied standing by a majority of the Court *on the basis of the Ninth Circuit's decision in the case at bar.*

2. The individual plaintiffs owning property abutting the waters of San Francisco Bay, unanimously held to *have* standing to challenge the filling of the Bay; and

3. The individual plaintiffs who lived at some distance from the shore of the Bay, also held to have standing by a majority of the court.

The Ninth Circuit's rule, expressed in this case and in *Alameda Conservation Association, supra,* is contrary to well-considered decisions of circuits which have recognized that a membership organization can, and should be permitted to, represent the collective position of its membership in administrative proceedings dealing with areas within the organization's particular interest.

See, for example, the D. C. Circuit's decision in *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (1970). In that "environmental" case, *all* of the parties seeking review were conservation organizations of one type or another, the Sierra Club among them. They were found to have standing. The Court said, *inter alia:*

> ". . . the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> "On the basis of petitioner's uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." (428 F.2d at 1097; footnotes omitted).

More recently, in a case involving economic competition, this Court has accorded standing to a membership organization which was the *sole* plaintiff in the case. See *National Association of Securities Dealers v. SEC,* 39

U.S.L. Week 4406 (U.S. April 5, 1971). See also cases cited in *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, *supra*, at notes 14, 15, and 17.

As Professor Jaffe has concluded,

> ". . . there are quite positive virtues in the direct assumption of party responsibility by an association. If the Court will allow a citizen or a taxpayer to sue, standing of a representative association would seem almost *a fortiori*." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 301 (1961).

A practical reason for allowing standing to a group is that it is more likely to represent a balanced viewpoint of a responsible segment of the public interest than is an individual litigant. The fact that there may be several groups with opposing ideas should be no detriment to standing; each group should have the right to contest what it deems to be illegal agency action which affects it adversely, or to support it.

In its *Alameda Conservation Association* case, *supra*, the Ninth Circuit rejects the idea that an organization should have standing to represent the interests of its members. The court there points out that "[a] corporate interest in one or more of its stated purposes and ideals may change depending upon the constituency of its board of directors." (..... F.2d ....., 9th Cir. 1971, No. 22,961, p. 7).

That is, of course, true. But is a conservation group a less reliable representative of the public interest than an individual private litigant? The individual is mortal, which a non-profit corporation is not, and he too may

change his mind, or move away, or just lose interest. On balance, it would seem that a well-established group, and not an individual, would be most likely to pursue a case of general public importance to its final legal conclusion.

If the Ninth Circuit is objecting to the concept of representative actions as such, it is swimming against the tide of the class action concept set forth in Fed. R. Civ. P. Rule 23. It is also bucking the concept which underlies the shareholder's derivative action. It is rejecting the concept of the "test case," without which the great strides made in civil rights in recent years would hardly be imaginable.

On balance, the rule allowing standing to groups to represent their members in public interest cases would seem eminently desirable. Cf. *NAACP v. Button,* 371 U.S. 415 (1963).

**F. The Sierra Club is Within the Zone of Interests Protected by the Conservation Code.**

With or without the benefit of an express statute providing for judicial review, a person "arguably within the zone of interests protected by a statute" has standing to seek review of an administrative decision based upon the statute. *Arnold Tours, Inc. v. Camp,* ..... U.S. ....., 27 L.Ed.2d 179 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations v. Camp.,* 397 U.S. 150 (1970).

In matters involving conservation, the Sierra Club clearly is within the zone of protected interests. To hold otherwise is to ignore the role that the Sierra Club and its founders have played in the entire conservation move-

ment, not to mention the expansion of Sequoia National Park and the creation of Sequoia National Game Refuge.[3]

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[3]On behalf of Stephen T. Mather, director, National Park Service, H. M. Albright testified before the House Committee on the Public Lands considering HR 5006, a bill to add certain lands to Sequoia National Park, in February, 1920. Referring to certain proposed boundaries set forth in the bill, he said:

> "First, I would like to make a point clear that has not been emphasized, and that is that the National Park Service did not originally outline those purple boundary lines. They were drawn, years before the Park Service was created, by the Sierra Club and with the advice of John Muir, whom we all know to have been one of the greatest naturalists of his time. John Muir traveled over this country from the early days of California up to the time of his death in 1914. At various times he brought up the question of having a park established, and I think that these lines were first drawn about 1911, but were never brought to the attention of Congress until comparatively recently . . ."
>
> "So this line, as I say, was drawn by those people who undoubtedly knew the mountains better than anybody else. The Sierra Club members probably know that area better now than any other living people. They go in there nearly every year, a club of about 2,000 members and they know every nook and corner of it; they know it better than even the Park Service does, and for that reason, even if we could see administrative changes in the proposed line that might be made, we would still feel like adhering to the boundary lines as drawn, because these people have studied so much more thoroughly." Hearing on HR 5006 before the House Comm. on the Public Lands, 66 Cong., 2d Sess., at 68-69 (1920).

See e.g., NASH, WILDERNESS AND THE AMERICAN MIND (Yale Press, 1967) esp. 132-133, 161-181; H. R. JONES, JOHN MUIR AND THE SIERRA CLUB—THE BATTLE FOR YOSEMITE (Sierra Club, San Francisco, 1965) esp. 4-9, 173-174; S. UDALL, THE QUIET CRISIS, (Intro. J. F. Kennedy), (Holt, Rinehart and Winston, 1963), esp. 109-126; J. ISE, OUR NATIONAL PARK POLICY, A CRITICAL HISTORY, (Johns Hopkins Press, 1960), esp. 88-89, 188-189; II W. F. BADE, THE LIFE AND LETTERS OF JOHN MUIR, (Riverside Press, Cambridge, 1924), esp. 255-257, 392-397; E. A. MILLS, YOUR NATIONAL PARKS, (Riverside Press, Cambridge, 1917); esp. 94-95; THE NATIONAL PARKS ASSOCIATION, BULL. 23 (December 14, 1921), Bull. 24 (January 30, 1922), Bull. 34 (July 6, 1923).

If conservationists are not "within the zone of interests protected by" the conservation statutes, it is difficult to imagine who might be. By definition, the conservation statutes do not protect persons with economic interests. Indeed, they protect *against* persons whose economic interests are to exploit the material wealth of public land at the expense of its despoliation. Others may be *affected* by the interpretation given to conservation statutes, but only those like the Sierra Club who would like to see our priceless heritage of natural beauty preserved are within the zone of interests *protected* by the conservation statutes.

**G. The Ninth Circuit has misplaced the burden with respect to the standing issue.**

The whole tenor of the Ninth Circuit's opinion on standing is that the Sierra Club has a heavy burden of establishing its standing, and that it has failed to sustain that burden. The approach is fundamentally wrong; "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). See also *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 157 (1970).

Nowhere does the Ninth Circuit suggest a good reason why the Sierra Club should not pursue its controversy with the Secretaries over their plans for Mineral King in federal court. The contention that defendants also had an "interest" in Mineral King, and, indeed, the contention that they have acted properly with respect to Mineral

King, is simply not responsive to the question of whether or not the Sierra Club has standing to seek judicial review. The rightness or wrongness of the Secretaries' action is a matter of the merits, not of standing.

**H. "Standing" should not be used as a means for avoiding judicial responsibility.**

The concept of standing offers a continuing judicial temptation to dispose of cases at an early stage without reaching the merits. This temptation should be eliminated. It conduces not only to false judicial economy but to serious avoidance of judicial responsibility.

As Professor Davis points out, floods of litigation have not followed even where statutes and judicial decisions have long afforded standing to practically anybody at all. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 471 (1970). And litigation over standing probably engages as much judicial time and effort as would decisions of these controversies on the merits.

Professor Jaffe disagrees somewhat with Professor Davis in approach, but urges judicial discretion to afford standing where a serious administrative wrong would otherwise go unredressed. See Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971).

As Professor Davis points out, there are other doctrines better calculated, where properly applicable, to ". . . accomplish judicial objectives unrelated to the task of deciding whether a particular interest asserted is deserving of judicial protection." Those doctrines include the law of "ripeness," "political question," "case or controversy," "scope of review," or simply "unreview-

ability." Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 469 (1970).

Where those other objections to judiciability are not present, a "private Attorney General" should not be turned away for "lack of standing." The purpose of courts in society is not merely to dispense justice but to reassure the populace that it is possible to get justice. Rigid rules of standing work counter to this objective. While it is disappointing for a litigant to be told that he is wrong, it is intolerable for him to be told that he will not even be heard.

It would not be amiss to think of the nation's national park and national forest land as property which Congress entrusted to the Secretary of the Interior and the Secretary of Agriculture for the benefit of all Americans, including generations yet unborn. Continuing that analogy, why should not the court have power to appoint the Sierra Club guardian *ad litem* for the beneficiaries of that trust? It may be argued that Judge Sweigert in effect did just that. On this record, it certainly could not have been an abuse of discretion for him to do so.

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

A narrow interpretation of "standing" means that many types of lawless administrative action will remain beyond the reach of justice. Here, the question is espe-

cially important because, unless defendants' lawlessness can be curbed now, it can never be curbed at all. The proposed changes in topography and vegetation of the Mineral King area, to be achieved with blasting powder, bulldozers and chain saws, will be irreversible and irreparable for all the foreseeable future.

Moreover, the Sierra Club is the only actual (or indeed likely) spokesman for the public interest in the preservation of Mineral King from the effects of illegal action. If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of the public lands, then the Sierra Club, or some comparable organizations, must have an opportunity to be heard.

The issue here is not a choice between the Sierra Club and a more appropriate plaintiff but between the Sierra Club and nobody. Cf. *Alderman v. United States,* 394 U.S. 165 (1969).

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## II. THE NINTH CIRCUIT APPLIED AN IMPROPER STANDARD FOR PRELIMINARY INJUNCTION

### A. Irreparable Harm Was Imminent.

The preliminary injunction granted by Judge Sweigert was necessary to prevent imminent harm to the public interest represented by the Sierra Club. The District Court had before it the immediate threat of the Secretary of the Interior to issue a permit to the State of California for construction of an illegal highway across Sequoia National Park (A. 29). At that point, the State would have been free to let construction contracts immediately (A. 28).

When Judge Sweigert acted, plans for Disney's private resort had been approved by the Forest Service. Issuance of the interlocking permits awaited only the award by the State of a contract for construction of a significant portion of the road (A. 28). The award of that contract would have perfected Disney's right to commence work on the entire project at Mineral King.

Judge Sweigert received evidence of the irreparable effects of the plans which the grant of permits would have set in motion. That evidence included internal memoranda of the Forest Service. One stated:

> "The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of proposed alteration of the basin is unacceptable to us—the damages extend beyond effects on fish and wildlife, and these alone are critical." (A. 131).

A second memorandum, this from the chief of the Forest Service Division of Recreation, observed:

> "Engineering may not have been aware that in accepting the Disney proposal, we agreed to the concept of a village with underground automotive service facilities for deliveries, maintenance, etc. *This brings with it a need for land modification, earth moving, and possibly stream channel changing beyond what we might normally permit.* The underground roadways and chambers must either be tunneled or built partially on the surface, boxed in and backfilled. The report favors the latter, *which means a great deal of earth and debris moving.*"

> ". . . The impact is certain to be heaviest at the village site and on the valley floor. By accepting the development proposal we have also accepted that some effect on fishing values, streamflow, vegetation, soil, and other resources must be provided for." (Emphasis added.) (A. 128-129).

The evidence also included a study by Dr. Richard J. Hartesveldt concerning the effects of the new highway upon the ecology of sequoia groves within the Park:

> ". . . there are a total of 103 giant sequoias below the proposed highway. Of these, 45 are in a position of possible jeopardy because of road construction." (A. 123).

As stated in a Forest Service memorandum from "Range and Wildlife Management" to "Recreation," Mineral King is a "fragile, sub-alpine area." (A. 131).

The proposed project would have had major, permanent and devastating effects if permitted to proceed (A. 127, 131, 142). If the District Court had permitted the project to proceed, later proof that it was illegal would have been an exercise in futility.

**B. The Injunction Did Not Threaten Irreparable Harm to Opposed Parties.**

If the project had been allowed to proceed, it would have caused irreversible adverse effects. Delay, on the other hand, could not produce irreparable harm. The Secretaries did not, as they could not, argue otherwise. They did complain that if an injunction barred surveys, studies and planning, it would delay the project and result in the loss of permit fees (A. 169).

Responding to this concern, Judge Sweigert tailored his order so that only actual construction or physical disturbance of the terrain was enjoined. That order was not to "be deemed to preclude the conduct of investigations, planning, surveys and exploration in connection with the design of said development [and highway]. . . ." (A. 201).

In its *amicus* brief in opposition to the petition for certiorari, Tulare County argued that its economic development is threatened by delay in completion of the Disney development (T.C.B. 10). Whether the project would constitute a net long-term gain for Tulare County is problematical.

Even if this contention were correct, it was presented for the first time as argument in the Ninth Circuit. There is neither evidence nor support for it in the record.

More important, it does not amount to irreparable harm. The potential adverse effects claimed by Tulare are at most an unfortunate by-product of the loss of a private investment—economic disappointment which any area suffers when a private investment, once a possibility, fails to materialize.

Neither did the preliminary injunction threaten irreparable harm to skiing interests. The Sierra Club has made clear that it does not seek to cast doubt on the legality of existing resorts (R.M. 9) of which there are already a large number.

**C. The Ninth Circuit Erred In Applying the "Reasonable Certainty" Test.**

Judge Sweigert found "that plaintiff has raised questions . . . sufficiently substantial and serious to justify a preliminary injunction" and that it made "a sufficient showing of imminent and irreparable injury to require pendente lite relief." (A. 198, 199).

The Ninth Circuit decided that Judge Sweigert applied the wrong test and thereby abused his discretion. It said that the Sierra Club was required to show both a "reasonable certainty" that it would prevail on these questions *and* that it would suffer irreparable injury in order to justify a preliminary injunction (A. 225). This was error.

The proper test, which was applied by Judge Sweigert, is set forth in the leading case of *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953). In that case, Judge Frank said:

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." 206 F.2d at 740.[4]

To require any stronger showing would be to involve the Court in a premature judgment of the merits of the

[4]The standard applied in *Hamilton Watch, supra,* has been employed uniformly. See, as examples, *Semmes Motors, Inc. v. Ford Motor Company,* 429 F.2d 1197, 1205-6 (2d Cir. 1970);

case without the benefit of a full hearing. As observed in *Love v. Atchison, T. & S.F. Ry. Co.*, 185 Fed. 321 (8th Cir. 1911):

> "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties *before their claims can be investigated and adjudicated.*" 185 F. at 331 (emphasis added)

The hearing for preliminary injunction does not provide for such a full investigation of the merits.[5]

In support of its "reasonable certainty" test, the Ninth Circuit cited *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13 (2d Cir. 1963), *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256 (6th Cir. 1968), which echoed *H. E. Fletcher, supra*, and *Hall Signal Co. v. General Ry. Signal Co.*, 153 Fed. 907 (2d Cir. 1907). The Ninth Circuit also characterized the required showing as a "persuasive demonstration". In support, it cited *District 50, United Mine Workers v. International U., U.M.W.*, 412 F.2d 165 (D.C. Cir. 1969) and *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358 (D.C. Cir. 1968). None of these cases support application of such a test where, as was the situation at bar, clear irreparable harm is threatened.

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*Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 392 (5th Cir. 1969); *National Lawyers Guild v. Brownell*, 225 F.2d 552, 554 (D.C. Cir. 1955); *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F.2d 226, 229 (3rd Cir. 1955); *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp.*, 215 F.2d 382, 385 (7th Cir. 1954).

[5]Accord, *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 695 (1965).

*Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199 (2d Cir. 1966) confirms that the Ninth Circuit misapplied this line of cases. In that case, the Second Circuit states:

> "We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a 'burden of convincing [the court] "with reasonable certainty" that it "must succeed at final hearing." Hall Signal Co. v. General Ry. Signal Co., 153 F. 907, 908 (2 Cir. 1907)," *where, as there, it appears that a 'lack of adequate showing of irreparable damage' also exists.* But we do not think that what was said in *Fletcher* is a departure from the more generally accepted statement of the rule that 'it will ordinarily be enough that the plaintiff [defendant here] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation,' where, as here, 'the balance of hardships' tips decidedly toward the party requesting the temporary relief. Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 740. The likelihood of success is 'merely one strong factor to be weighed along with the comparative injuries of the parties.' 3 Barron & Holtzoff, Federal Practice & Procedure § 1433, at 493 (1958)." 366 F.2d at 201, 203 (Emphasis added).

Both the *H. E. Fletcher* and *Hall* test and the similar "convincing presentation" test are inapplicable where irreparable harm is imminent. *District 50, United Mine Workers v. International U., U.M.W., supra,* following *Udall v. D.C. Transit System, Inc., supra,* cites the *Unicon* decision with approval and imposes the strict proof

requirement because "the showing of irreparable harm is weak." (412 F.2d at 168). *Udall* was a case similarly devoid of a showing of irreparable harm.

Neither is there any basis for imposing a greater standard because the injunction deals with "the discretionary action of an official of cabinet rank." In *National Lawyers Guild v. Brownell,* 225 F.2d 552 (D. C. Cir. 1955), a suit to enjoin an administrative act of the Attorney General, the court said:

> "A motion for preliminary injunction requires the court to determine whether there are *substantial questions* and whether there would be irreparable injury to one party or the other, and to balance the equities between the parties." (225 F.2d at 554). (Emphasis added).

That standard is a restatement of the *Hamilton Watch* rule. A line of cases deriving from *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921 (D. C. Cir. 1958), requires a "strong showing that [plaintiff] is likely to prevail on the merits of its appeal" when, having been ruled against in an administrative decision, it seeks to stay or enjoin the administrator from giving effect to the order pending an appeal. The higher standard applies to such cases because the stay is sought after plaintiff has lost on the merits. It then acts as an "intrusion into the ordinary processes of administration and judicial review." (259 F.2d at 925).

Where, by contrast, the plaintiff has had no opportunity to be heard on the merits and seeks an injunction in aid of that opportunity, the standard applied by the trial court is that of *Hamilton Watch,* whether the defendant

is a federal administrator or not. See *United States v. Moore,* 427 F.2d 1020 (10th Cir. 1970); *Baggett Transp. Company v. Hughes Transp., Inc.,* 393 F.2d 710, 716-17 (8th Cir. 1968).

The Secretaries in their brief opposing the grant of certiorari correctly acknowledge that the "reasonable certainty" test is applicable to this case only if there was no threat of irreparable harm. Their argument that the Club was not threatened is based upon the erroneous test of standing applied by the Ninth Circuit.[6] With the Club's standing to represent the public interest confirmed by this Court, the Secretaries will be forced to concede that Judge Sweigert was correct in finding a threat of irreparable harm to that public interest, that he applied the proper test and that the Ninth Circuit erred.

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## III. THE MERITS

### A. Introduction.

The issues which the Sierra Club presented to the District Court were whether:

1. 16 U.S.C. §497 bars long-term use of more than 80 acres of national forest land for recreational purposes.

2. 16 U.S.C. §688 bars a use of the lands of the Sequoia National Game Refuge which would interfere with game animals and their habitat.

3. 16 U.S.C. §1 bars use of a National Park for a non-park purpose.

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[6]See footnote 2 (Def. B. 7-8).

4. The Secretary of the Interior's Rule for Road Building in National Parks, 34 Fed.Reg. 19, bars approval by the Secretary of a highway across Sequoia National Park absent the required public hearings.

5. 16 U.S.C. §45(c) bars construction of a transmission line in Sequoia National Park without Congressional authorization.

At the threshold, these issues are not contests of administrative discretion. The threatened acts were clearly outside the scope of administrative authority. They did not involve problems of statutory construction calling for agency expertise and judicial deference. Rather, they were attempts to act outside unambiguous limits set by Congress.

> "'Where the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." (citing authority) *Barlow v. Collins,* 397 U.S. 159, 166 (1970).
>
> "Judicial relief is available to one who has been injured by an act of a governmental official which is in excess of his express or implied powers." *Harmon v. Brucker,* 355 U.S. 579, 581-582 (1958).

Nor does the fact that the challenged administrative decisions involve the public lands immunize them from judicial review. See e.g. *United States v. Coleman,* 390 U.S. 599 (1968); *State of Washington v. Udall,* 417 F.2d 1310 (9th Cir. 1969).

This Court has observed recently that, even where *de novo* review is not available, the scope of judicial review of administrative acts is substantial. *Citizens to Preserve*

*Overton Park v. Volpe,* 39 U.S.L. Week 4287, 4291 (U.S. March 2, 1971). The presumption of regularity of administrative decisions "is not to shield [the Secretaries'] action from a thorough, probing, in-depth review" *(Ibid.).*

The reviewing court must decide: 1. Whether the Secretary's threatened acts were outside any statutory authority (by defining the scope of that authority) and, 2. Whether actions within the scope of that authority were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Overton Park* case, *supra* (39 U.S.L. Week 4287, at 4291; 5 U.S.C. §706(2)(A) (Supp. V)).

Judicial review also requires the court to decide "whether the Secretary's action followed the necessary procedural requirements." (39 U.S.L. Week 4287 at 4292).

The Ninth Circuit failed to decide these questions.

Concerning the 80 acre limitation, if other requirements of law are met, the Sierra Club could not quarrel with any reasonable decision of the Secretary to grant a permit for a ski resort at Mineral King with a total acreage requirement of less than 80 acres. Neither could it second-guess any reasonable configuration of improvements on that acreage. Nor could it complain of his refusal to grant any permit at all. All of those matters are within his administrative discretion. However, "administrative discretion" does not shield the Secretary when he ignores 16 U.S.C. §497 and exceeds his 80 acre authority, for that is a limit established by Congress.

The Sierra Club could not challenge a construction project in a national park intended to serve a park pur-

pose unless the decision to permit the construction was without rational basis or followed a procedural error. This would be so even if the Club disagreed violently with the benefit-detriment analysis of the Secretary of the Interior. But the Secretary's broad management prerogative is not relevant when he ignores 16 U.S.C. §1 and authorizes highly damaging construction in a national park to serve a non-park purpose.

The Club could not challenge the Secretary's decision to authorize construction of a low voltage electrical *distribution* line in Sequoia National Park for a valid park purpose though it disagreed with his decisions concerning its location or the necessity for it. But the Secretary may not disregard 16 U.S.C. §1 and 16 U.S.C. §45(c) by authorizing construction of a *transmission* line to serve a purpose foreign to the Park and without Congressional approval.

The Sierra Club challenges the Disney project in Sequoia National Game Refuge because there is no evidence that the Secretary of Agriculture made the finding, required under 16 U.S.C. §688, that the Disney project would be consistent with the statute's purposes. See *Citizens to Preserve Overton Park v. Volpe,* 39 U.S.L. Week 4287, 4293 (U.S. March 2, 1971). The requirement of a finding is significant; it is clear from this record that the Secretary of Agriculture could not rationally have made it and could not, therefore, have approved the project. If Agriculture had found that Disney's use would not interfere with game in the Refuge, or its habitat, that finding would have been arbitrary, capricious and an abuse of discretion.

The Secretaries are under pressure to commit public lands to commercial exploitation, both to justify budgetary requirements of their agencies and to please powerful and persuasive applicants for development permits. In dealing with large areas of ordinary federal lands, the Secretaries have broad discretion. In dealing with Sequoia National Park and Sequoia National Game Refuge, their discretion is greatly limited by statute because those portions of the public lands are not merely valuable real estate but a priceless national resource.

The Ninth Circuit erred in finding that Judge Sweigert abused his discretion when he so interpreted the limits of permissible administrative action allowed to the Secretaries. The succeeding sections establish that point as a matter of law.

**B. The Ninth Circuit's Decision Has Repealed the Statute Limiting the Size of Private Developments in National Forests.**

Congress has authorized the Secretary of Agriculture to permit long term private recreational use of national forest land throughout the United States in only one statute, enacted in 1915 and amended in 1956: 38 Stat. 1101, 70 Stat. 708, 16 U.S.C. §497.

Under that statute, the Secretary may ". . . permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety, . . ."

Disney could not locate all major and indispensable components of its planned development on 80 acres at Mineral King. The project simply is too large for that. The record shows that ski lifts, towers, sewage treatment facilities and parking structures would be located on land in excess of that limit.[7]

In its effort to circumvent the 80 acre limitation, Agriculture proposed to cover the necessary additional acreage with a second permit characterized as "terminable" (A. 169). The statute which is offered in justification for this permit is 16 U.S.C. §551, under which "The Secretary of Agriculture . . . may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; . . ."

The Ninth Circuit committed three fundamental errors in failing to recognize that neither 16 U.S.C. §§497 and 551 nor any other authority, afford Agriculture discretionary power to permit long-term recreational use of

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[7]Opposing certiorari, the Government erroneously suggested that Disney's major facilities would be located only on the 80 acres of National Forest land covered by the term permit issued pursuant to 16 U.S.C. §497. They referred specifically to "parking lots". (Def. B. 3)

The record shows that a five story parking structure, sewage treatment facilities and ski lifts would be included in those major features which would be located outside the 80 acres on land to be covered by the so-called "revocable", supplemental permit (A. 15, 23, 31). The District Court so found (A. 188). The Ninth Circuit did not overrule this finding, observing "that *most* major improvements are to be located upon lands held under the eighty-acre term permits (sic) . . ." (A. 229)

more than 80 acres of national forest land at Mineral King.

The first error came when the Ninth Circuit completely ignored the acreage limitation of Section 497. It committed the second when it concluded that Agriculture may permit the indefinite use of national forest land under Section 551, without specific Congressional authority, under a permit not truly revocable at will. The third error came when the court relied upon other instances in which a combination of term and revocable permits has been employed to establish the legality of the permits challenged here.

**1. Congress Intended to Limit Recreational Developments on National Forest Land to 80 Acres.**

The Ninth Circuit's first error was that it assumed that Section 497 was not intended to limit the size of long-term recreational uses of national forest land. It concluded that Section 497 was enacted solely to provide the certainty of tenure demanded by lenders before they would finance recreational developments. If that had been the purpose, no area limitation would have been required. The statute need only have assured that the permit would be valid for a term of years.

In fact, the legislative history of Section 497 fully supports the clear intention of Congress expressed in the statute that long term use of national forest land for recreation be restricted to developments not exceeding 80 acres.

In its original form, Section 497 authorized permits covering up to five acres with a term not to exceed thirty

years for summer homes, hotels, stores and other structures needed for recreation or other public convenience.[8]

The first change in the five-acre limit came in 1948 when Congress increased to 80 acres the permissible area for recreational developments in the Territory of Alaska (48 U.S.C. §341). Then Acting Secretary of Agriculture Charles F. Brannan urged the increase on the basis that while 5 acres was adequate for such purposes as a "summer home or a small resort", it was inadequate "for the increasingly common type of outdoor camp or lodge with associated dwelling units *and service facilities.*" (S.Rep. No. 899, 80th Cong., 2d Sess., 1948; 1948 U.S. Code Cong. and Adm. News at 1337). (Emphasis added).

Significantiy, Secretary Brannan went on to say: "Winter-sports facilities are often strung out, especially ski lifts, etc., and need elbowroom." (*Ibid.*). Thus Brannan sought to have his authority expanded from 5 to 80 acres so that "*service facilities*" and winter sports facilities, such as "ski lifts" might be included within 80 acres. He thereby acknowledged and represented to Congress that such facilities must fall within the 80-acre limitation.

The bill as introduced was not restricted to Alaska. It covered national forest land generally. Congress manifested its resistance to overdevelopment of the national

[8]"That hereafter the Secretary of Agriculture may, upon such terms as he may deem proper, for periods not exceeding thirty years, permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience, not exceeding five acres to any one person or association, but this shall not be construed to interfere with the right to enter homesteads upon agricultural lands in national forests as now provided by law." March 4, 1915, 38 Stat. 1101.

forests in the following passage from the report of the House Committee on Agriculture:

> "Because of the possibility that provisions of the bill might be applied, with effects not as desirable as would be the case in their application to Alaska, the committee's amendments provided for that specific use only." Incorporated in S.Rep. No. 899, 80th Cong., 2d Sess., 1948; 1948 U.S. Code Cong. and Adm. News at 1337.

The reasons advanced by the Secretary of Agriculture in 1956 for his support of the legislation to expand his term permit authority to 80 acres throughout the United States were almost identical with those advanced in 1915 and again in 1948. Acting Secretary True D. Morse, writing to the Chairman of the Senate Committee on Agriculture and Forestry on August 5, 1955, stated:

> "Under existing laws this Department has adequate authority to issue revocable permits for uses for which long-term tenure is unnecessary or *undesirable*. . . .
>
> *"The act of March 4, 1915, however, is inadequate* to meet other needs for term permits on the national forests *because it limits use and occupancy* to summer homes, hotels, stores, or other structures needed for recreation or public convenience, and the permit area *to a maximum of 5 acres.* It is frequently found that term permits would be desirable for uses not specified in the act of March 4, 1915, and *permittees often need more than 5 acres for their authorized operations.*
>
> *"S. 2216 would meet needs to grant term permits up to 80 acres for* such public and semipublic uses as landing fields, resorts, campgrounds, picnic areas,

> organization camps and *ski lifts* and to industrial and commercial enterprises such as sawmills, mining camps, wharves, and warehouses, which would contribute to the general welfare and which could be located so as not to interfere with the proper utilization of national-forest resources." S.Rep. No. 2511, 84th Cong., 2d Sess. 3, 1956 (Emphasis added).

Congress yielded to this pressure and raised the acreage limitation to 80. At the same time, it again manifested its intention to limit the size of developments in the national forests. For the first time, it specifically required that, in addition to hotels, resorts and structures, this 80 acres must include "*any . . . facilities* necessary or desirable for recreation, public convenience, or safety." 70 Stat. 708 (16 U.S.C. §497).

The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531 in no way repealed clear limits upon the power of Agriculture set forth in Section 497. The purpose of the 1960 legislation was to make explicit that which had been implicit for many years, namely, that Agriculture's responsibilities include management of national forests for recreation, range and wildlife purposes as well as for preservation, watershed management and timber production. (H.Rep. No. 1551, House Committee on Agriculture, 86th Cong., 2d Sess., 1960; 1960 U.S. Code Cong. and Adm. News 2377.)

**2. Agriculture May Not Permit Use of Public Land Without Express Congressional Authority Unless the Permit is Revocable at Will.**

The second fundamental error of the Ninth Circuit came in its assumption that the Secretary of Agriculture may permit a use and occupancy of national forest land

under a so-called "revocable permit" when the use and occupancy is not truly revocable at will.

a. *The Supplementary Permit is Not Revocable at Will.*

The so-called "terminable" or "revocable" permit involved in this matter is neither. It is a completed version of Form 2700-4 (A. 23) specified for use by the Forest Service Manual, Section 2711.1-3 (B.A. xvii). An examination of this form reveals that, though characterized as an annual permit by Agriculture, it is not an annual permit in any sense of that word. The length of its term is not mentioned. Rather, the Forest Service Manual itself (Section 2711.1-5, October 1968, Amendment No. 12, B.A. xvii) conceives of the duration of such a permit as the time of "actual need". The only reference to "annual" is in provisions for payment found in Section 1 (A. 23).

The only provision dealing with termination is in Section 15 (A. 24). The section states that "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service".

The rights of the permittee under an annual permit charged with a breach of condition are the same as in the case of a thirty-year permit. He is afforded an opportunity to cure after notice (F.S.M. 2716.3, B.A. xvii).

"Discretion" as used in Section 15 is not absolute or uncontrolled. This is evidenced by the extensive appellate procedures established before *any* permits, including "annual" permits, may be revoked with finality. Under procedures established by the Secretary of Agriculture ("Appeals From Administrative Decisions Relating to the Ad-

ministration of the National Forests or other lands under administration of the Forest Service", 36 C.F.R. §211.20-§211.119), Disney could appeal any revocation. Such an appeal tests the *grounds* upon which the permit was revoked. The existence of an appellate procedure means that the exercise of discretion must be a reasonable exercise. The Secretary could not destroy a 35 million dollar investment at his whim and caprice. Certainly this would not be permitted by any court to whom Disney ultimately would have recourse. Judge Sweigert observed that "[t]hese provisions strongly suggest to the Developer that the so-called "revocable" permit is not really revocable 'at will' . . ." (A. 191).

From an economic standpoint, it is *inconceivable* that prior to the expiration of the thirty-year term, the Forest Service would require Disney to remove the parking structure, ski lifts and other indispensable facilities located outside the 80 acre limit and installed under this permit. This would destroy the value of facilities located within that limit.

Without lifts, sewage disposal facilities, roads, avalanche dams and the parking structure, the ski resort could not exist. Removal of these facilities would effectively destroy the entire 35 million dollar investment, including the value of those facilities "protected" by the thirty-year term permit. The "chilling effect" of all this upon the free exercise of any forest service management authority would be extreme.

Thus, this so-called "revocable" permit, when so inexorably tied by money, improvements and use to a thirty-year term permit, is in reality a thirty-year term

permit. As a matter of fact it would never be revoked. As a matter of law, it takes on the character of a license coupled with an interest and thus is irrevocable for so long as the term use with which it is intertwined continues.

The District Court summarized the situation very well, recognizing that

> "It is inconceivable that Agriculture would, or could under the terms of the 'revocable' permit and the circumstances of its issuance, suddenly and 'at will' require the Developer to remove ski lifts, towers, refuse and sewage disposal, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year 80-acre term permit." (A. 191-92).

b. *Agriculture is Without Authority to Issue Such a Permit*

The Ninth Circuit erroneously decided that a revocable permit need not be terminable "at will" (A. 228). This suggestion is at the heart of its decision reversing Judge Sweigert. The decision has the effect of repealing 16 U.S.C. §497; it is at odds with Article IV, Section 3, clause 2 of the United States Constitution which vests exclusive power over public lands in the Congress; and it is in conflict with relevant opinions of the courts and the Attorney General.

The Ninth Circuit relied upon a 1905 opinion of the Attorney General[9] and upon a failure of the court to

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[9]See opinion and footnote 12 at A. 227.

discover any requirement "that a revocable permit be terminable 'at will'" outside a 1928 Attorney General's opinion which had been cited by counsel for the Secretary of Agriculture (A. 228).

First, the Secretary's general regulatory power over national forests under 16 U.S.C. §551 is not a basis for a permit granted for "the time of actual need" or any other indefinite duration. The Ninth Circuit dealt with this issue in *Osborne v. United States,* 145 F.2d 892 (9th Cir. 1944). It found that a permittee was not entitled to a condemnation award when his grazing permit issued under Section 551 was terminated. It stated:

> ". . . No grant of United States property may be made except by virtue of Congressional authorization (Art. 4, §3, Const.; *Shannon v. United States, supra*), and the mere authority given the forest service to make appropriate regulations carries with it no authority to alienate for any period of time any phase of government right over the full use of its lands. . . .
>
> "It is safe to say that it has always been the intention and policy of the government to regard the use of its . . . national forests, under regulation through the permit system, as a privilege which is *withdrawable at any time.* . . ." 145 F.2d at 896 (Emphasis added).

Section 497 is the only relevant source of authority.

The Ninth Circuit erred in relying upon the 1905 Attorney General's Opinion for its conclusion that a permit issued under Section 551 need not be revocable at will. That opinion, which dealt with the use of forest lands for a fish salter, oil and fertilizer plant, sanctioned

the grant of a permit for a duration which ". . . under the circumstances of each case would seem reasonable" based upon the following statement:

> "The legislation expressly referring to forest reservations is silent with reference to the period for which the permits may be granted, and my attention has not been called to any other statutory provision which can be said to limit your action in this connection." (25 Op. Atty. Gen. 470, 472 (1905)).

The legislative silence was ended ten years later when Congress enacted 16 U.S.C. §497. This section established clear limits of power which the Secretary of Agriculture could not circumvent by issuing supplementary permits not truly revocable at will.

While he was the Attorney General, Chief Justice Harlan Fiske Stone was asked to review an agreement between the Secretary of the Navy and a licensee of certain government owned patents. He examined the Constitutional limitation upon the disposal of public property which is applicable to all departments of government and stated that:

> "No public property can, therefore, be disposed of without the authority of law, either by an express Act of Congress for that purpose, or by giving the authority to some Department of the Government, or subordinate agent." See also *Wisconsin R. Co. v. Price County,* 133 U.S. 496, 504. . . . [t]his prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein" (34 Op. Atty. Gen., 320, 322 (1924)).

He found that the executive may grant a revocable license, and stated the limit of this power, as follows:

> "But, as pointed out in 22 Op. 240, 246, the power to issue such revocable licenses, inasmuch as they vest no estate, interest, or franchise and confer no right whatever to the continuance of the permission thereby given, has been habitually exercised as an incident of the power of management and control, whenever, in the Secretary's judgment the permission will subserve the interests of the Government. . . .
>
> '. . . It being clearly understood that such permission creates no right, interest, or franchise in the license and that, however long continued, *the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government*'." (*Id.*, at 327, 328) (Emphasis added).

Without this limitation of power, those statutes, including 16 U.S.C. §497, which set acreage limits upon the use of public lands would be without meaning.

The Ninth Circuit interpreted the decision of the District Court to mean that term and revocable permits never may be employed on the same project. In fact, nothing in Judge Sweigert's opinion supports this interpretation.

Neither the District Court nor the Club has dealt with circumstances or permits outside this case. The Sierra Club does not challenge the legality of existing recreational developments which involve a combination of term and revocable permits. It does deny the legal authority of the Secretary of Agriculture to permit the long-term location of indispensable facilities on, and the long-term use of, more than 80 acres at Mineral King.

**3. Other Instances of Combined Permits Do Not Legalize the Combination At Mineral King.**

The Ninth Circuit committed its third error when it decided that combinations of term and revocable permits for other recreational developments on national forest land confirm the legality of such a combination at Mineral King.

At the outset, even if the Forest Service had a uniform practice of issuing a combination of term and supplemental permits to evade the 80-acre limitation on long-term use, that would not be proof of the legality of the permits at Mineral King, convincing or otherwise. The administrative interpretation, while consistent, would be illegal.

The record before the District Court reflects only the bald assertion of a Forest Service employee in his affidavit that "[t]here are now in the United States a total of at least 84 recreational developments on national forest lands in which there is such a combination of a 30-year term permit and terminable permits . . ." (A. 169). Significantly, there is no assertion anywhere in the record that indispensable facilities were erected at any of those ski areas *outside* the 80 acres covered by the term permit.

Nor did the Ninth Circuit have before it any evidence of a consistent administrative practice of employing combined permits covering indispensable facilities to circumvent the 80 acre limitation of Section 497. In fact, if the Government had introduced any evidence, it would have established that there has not been a consistent administrative practice. This Court may take judicial notice of the fact that the combined permits which have

been issued for ski resorts by the several Forest Service regional offices manifest a wide spectrum of practice.

In some instances, the issuing authority has sought to uphold the limits set in Section 497. Some permits bar the location of any improvements on land other than that covered by the 80 acre term permit.[10] In other instances, apparently responding to the recent demand for larger ski facilities, Regional Foresters have sought to circumvent the 80 acre limit employing the device of a supplemental permit.[11]

It can be argued that there is administrative practice *upholding* the acreage limitation and the plain meaning of Section 497. In fact, there has not been a consistent administrative interpretation disregarding that plain meaning. At best, the practice followed by the Forest Service is equivocal. It certainly does not furnish a basis for deciding the legality of the particular combination of permits at Mineral King nor prevent this Court from interpreting the 80 acre limitation of 16 U.S.C. §497.

Nor may it be asserted that Congress either approved evasion of the 80 acre limit when it amended Section 497 in 1956 or that it has acquiesced in any such evasion since 1956. If Forest Service Headquarters in Washington, D.C., has been aware of any such practice, it has not issued a ruling or regulation confirming it prior to the 1956 amendment to Section 497. Neither has it done

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[10]See e.g. permits issued on September 18, 1963 by Forest Service Region 3 to Lake Peak Corporation of Santa Fe, New Mexico and on December 18, 1962 by Forest Service Region 2 to Buttermilk Mountain Skiing Corporation of Aspen, Colorado.

[11]See e.g. permits issued on June 2, 1967 by Forest Service Region 6 to Alpental Land Company of Lakeview, Washington.

so since that time. Therefore, Congress is not presumed to have ratified the interpretation when it amended 16 U.S.C. §497 in 1956. *Commissioner v. Lake,* 356 U.S. 260, 265 fn 5 (1958); *Helvering v. New York Trust Co.,* 292 U.S. 455, 468 (1933). "To find significance in congressional non-action under these circumstances is to find significance where there is none." *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 141 (1941).

The District Court correctly observed that if Congress, when enacting and amending the acreage limitation, had in mind that it could be circumvented or nullified in this fashion, ". . . it could have spared itself time and trouble by omitting any area limitation—or by otherwise indicating its intent." (A. 192).

A decision that the combination of permits at Mineral King is illegal, if it cast doubt upon the legality of any existing resorts, could be limited in its application to *Mineral King and future developments.* The broad power of the Court to limit retroactive application of its decisions has been confirmed repeatedly. *Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *Grt. Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358, 364 (1932).

**C. Authorization of Disney's Huge Resort in a National Game Refuge Was Illegal.**

In 1926, Congress greatly expanded and adjusted the boundaries of the Sequoia National Park. The legislation[12] also created the Sequoia National Game Refuge, which is surrounded on three sides by the Park. Mineral King valley is entirely within the Game Refuge.

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[12]44 Stat. 821 (1926).

The Game Refuge comprises about 15,000 acres tied to the surrounding Sequoia National Park for all eternity by its geographic and ecological characteristics. "It has essentially the same flora and fauna as the Park, including some giant Sequoias at lower elevations". (A. 26).

Earlier bills for the enlargement of Sequoia National Park had included the Mineral King enclave in the Park.[13] It was omitted only because Congress believed that it should not impede the insignificant mining activity at Mineral King.

This fact, and Congress' concern that Mineral King receive special treatment as a habitat for game are confirmed in hearings on the legislation. Then Forest Service Chief W. B Greeley testified before the House Committee on Public Lands as follows:

> "The Chairman. Will the game refuge be subject to grazing?
>
> Mr. Greeley. I *think not*. There may be a little grazing in there, but practically none.
>
> The Chairman. You will not permit grazing in there?
>
> Mr. Greeley. No, sir; grazing ought to be excluded from the game refuge area.
>
> The Chairman. If the game refuge area were in the park addition it would really be a game refuge, would it not?
>
> Mr. Greeley. Yes, it would be a complete game refuge.
>
> The Chairman. What is the particular reason for segregating this and setting it aside as a game refuge?

[13]See H.R. 5006, 66th Cong., 2d Sess. (1920).

Mr. Greeley. In the first place we felt that the Mineral King area should be kept out of the park, because there is a considerable section of mineralized territory there that has been prospected and mined in a small way for a good many years. Now, leaving that out of the park, you can readily appreciate that with the park boundaries surrounding this little peninsula of natural forest land, all but the little neck, it would be extremely easy to have poaching on park lands if hunting were permitted on the national forest lands. Aside from that there is a very valuable deer herd in this region partly in the national forest and partly in the present park, and we think as a matter of game conservation it is desirable to enlarge somewhat the area subject to special protection. This is one of the big breeding grounds of deer for the whole southern Sierra region.

The Chairman. Prospecting will be permitted in the game preserve, will it?

Mr. Greeley. Yes; all national forest uses, not inconsistent with a game refuge will be permitted there. That will include prospecting.[14]

What emerged was 16 U.S.C. §688, which reads as follows:

"All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of sections 688-689d of this title, are designated as the Sequoia National Game Refuge, and the hunting, trapping,

[14] *Hearings on H.R. 9387 before the House Committee on Public Lands*, 69th Cong., 1st Sess. 57, 58 (1926).

killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; *Provided,* That *it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon,* and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto *so far as may be consistent with the purpose for which said game refuge is established.*" (Emphasis added.)

Congress expressly protected the lands of the Refuge from trespass and protected the game animals which might find their way to Mineral King. As the statute and the hearings reveal, Congress did not intend to prevent all entry to the lands. In barring "trespass" on the lands, it was protecting the habitat of the game. Prospecting was allowed. By contrast, the Forest Service represented to Congress in the hearings that grazing, which would diminish the quality of the habitat, would be barred.

Now, Agriculture proposes to permit dedication of the Refuge to a private construction project including 20 ski lifts, manicured slopes, hotels and lodges, 10 restaurants, a chapel, convenience and specialty shops, conference center, swimming pools, theatre, general store, 5-story

parking facility, hospital, sewage treatment plant, housing for over 700 employees and 14,000 customers (A. 5-6, 27, 32, 53a-c, 143, 204). That usage would produce nearly twice the concentration of persons found in Yosemite Valley at the peak of activity there (A. 28).

The horrendous impact of such use on the small and fragile Game Refuge is apparent. California Fish and Game Commission personnel have stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment." (A. 76).

The Forest Service itself, through its Range & Wildlife Management section, has admitted facts which establish that the Disney use would have been inconsistent with the purposes of the Game Refuge. An internal Forest Service memorandum observes:

> "*The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors* . . . . The extent and nature of proposed alteration of the basin is unacceptable to to us—the damages extend beyond effects on fish and wildlife, and these alone are critical.
>
> "Specifically, stream diversions and channel treatment, flood and debris control, surface water supply development, and sewage disposal proposals are all of a nature we find severely damaging or unacceptable.
>
> "*It is recognized that development of high intensity year-round recreational use in this restricted fragile sub-alpine area is bound to result in pronounced impacts and certain unavoidable changes*" (A. 131). (Emphasis added.)

Disney itself has said that:

> "Grooming and manicuring of most slopes without destroying the naturalness of the area, particularly for intermediates, will require extensive bulldozing and blasting in most lower areas and extensive rock removal at higher elevations. This is especially true for the Mosquito, Eagle and White Chief Bowls and the lower Farewell Canyon area." (A. 32).

Agriculture has made no finding that the proposed ski resort is a use consistent with the National Game Refuge. This failure was an abuse of discretion. More significantly, a finding that Disney's "wonderland" was a use consistent with the purposes for which the Game Refuge was established would have been arbitrary and capricious. It is pure sophistry to suggest a finding that bulldozing, blasting and manicuring for 14,000 skiers per weekend is a use consistent with a game refuge.

The Ninth Circuit's response to all of this was to quote from the first few lines of Section 688, leaving out its statement of purpose and to conclude that it found "no substance in this argument." (A. 234). That court made no attempt to define the limits of the power of Agriculture to permit uses within the Game Refuge. This Court must correct that error if Sequoia National Game Refuge is to be preserved from destruction.

**D. Interior May Not Approve a Highway Across a National Park For a Non-Park Purpose.**

The Secretary of the Interior acted illegally in approving a construction across Sequoia National Park of a freeway to serve a non-park purpose. That purpose is to link the state highway system located outside of the

park to the west with Mineral King located outside the Park to the east.

The District Court doubted the legality of the new freeway. Those doubts were brushed aside by the Ninth Circuit. It relied on its observations that the new freeway through the Park would replace a substandard road which is "legal". The Ninth Circuit observed that the adverse impact upon the Park would be minimized and that under 16 U.S.C. §8 the Secretary has broad discretion to construct roads in national parks.

The Ninth Circuit failed to define the applicable limits of the Secretary's power. Congress has authorized him "to promote and regulate the use" of parks only

> " . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment for future generations." 16 U.S.C. §1.

By this enabling legislation, Congress limited the Secretary's authority to make any changes from the natural state to those which serve, or conform with, a park purpose.

Nevertheless, the Ninth Circuit evidenced no interest in the purpose of the freeway. It did not challenge the conclusion of the District Court that the freeway would serve as a connecting link to a destination outside the Park. Nor has the Secretary denied, because he cannot, that the sole impetus for the freeway was the Disney

project, a non-park purpose. The National Park Service has no plan to develop the portion of the Park touched by the freeway (A. 36). Any benefit to the Park in the form of increased access to the areas traversed is fortuitous.

In his consultation for Interior, highway design engineer John Clarkson identified the adverse effect upon the park, its game and other values as follows:

> "Obviously, any road construction to present-day standards could not be built through this area without affecting the ecology of the area. Within the road prism (cuts and fills) plant life would, of course, be disturbed, and since the top soil for regenerating plant life is sparse, early vegetative cover on cut and fill slopes would be very slow in developing.
>
> "More than that, the road, if primarily based on cut and fill construction, would be a barrier to wild life and visitor movements throughout this area of the park. Animals and men would have to cross the road to the risk of not only of such persons and wild life but also to the risk of users of the highway." (A. 142).

The Ninth Circuit failed to recognize that Interior may permit within national parks only those alterations which serve a park purpose. The Ninth Circuit thus saw the challenge of the Sierra Club as nothing more than a quarrel with the Secretary's exercise of his discretion. This was its fundamental error.

The Club does *not* challenge the broad management prerogatives of Interior to decide what best serves park purposes. It does challenge his power to approve de-

struction of park values and construction of a freeway not conceived to satisfy a park purpose.

The Ninth Circuit is equally wrong when it suggests that, having once acted outside his authority by approving a non-park-purpose freeway, the Secretary may cure the illegality with construction techniques designed to minimize the adverse effect upon national park values. This interpretation would deprive the statute of any meaning. It is tantamount to a statement that the Secretary may ignore statutory limits on his powers so long as he does so carefully.

Recent legislation reinforced the conclusion that Congress recognizes the destructive effect of highway construction in national parks and intends that it be avoided.

The Department of Transportation Act of 1966[15] along with the Federal Aid to Highway Act of 1968[16] bar the

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[15]"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, of any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 49 U.S.C. § 1653(f) (Supp. V).

[16]"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and water-

use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" alternative route exists. This Court found in *Citizens to Preserve Overton Park v. Volpe,* 39 U.S.L. Week 4287 (U.S. March 2, 1971) that only the most unusual situations are exempted from that bar. It also found that "If the statutes are to have any meaning, the Secretary cannot approve the destruction of park land unless he finds that alternative routes present unique problems." 39 U.S.L. Week at 4290.[17]

Interior Secretary Stewart Udall was pressured to approve the highway because, while the route across the Park was not the only available avenue, it was the cheapest. The record shows that at least two other routes which would avoid traversing the surface of the Park are available, each of which has been less attractive because of cost (A. 66).

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fowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 23 U.S.C. § 138 (Supp. V).

[17]Three million dollars in federal funds from the Economic Development Administration are allocated to construction of the Mineral King Highway (A. 161).

The enactment of 16 U.S.C. §8[18] in 1924 authorizing the Secretary to construct park roads did not broaden his authority. Neither the statute nor its legislative history suggests that Congress intended to exempt roads from the park purpose requirement of 16 U.S.C. §1. Section 8 was the first section of an appropriation measure motivated by the necessity of repairing existing roads. The report of the House Committee on the Public Lands following its consideration of the bill which became 16 U.S.C. §8, includes a letter from Secretary of the Interior Hubert Work in which he confirms this, as follows:

> "In my opinion the most urgent demand of the national parks to-day is for the reconstruction of most of the existing roads within their borders to measure up to the high standard of the roads constructed or being constructed to their boundaries by the United States or by the various States either with or without Federal aid, and for a few new roads .... Practically all roads in the national parks were originally built for horse-drawn vehicular traffic, and with the advent of the automobile have proven inadequate .... For automobile use the existing park roads are in many instances too narrow for safe driving, contain too much adverse grade, and particularly have not the base to withstand the continuous and severe pounding of modern high-powered motor vehicle travel ...."
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> H.Rep. No. 258, 68th Cong. 1st Sess. 2 (1924)

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[18] "The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior." 43 Stat. 90.

Further evidence of Congressional intent is found in a 1962 report of the House Committee of Interior and Insular Affairs dealing with the establishment of the Padre Island National Seashore:

> "As introduced, the House bills required construction of a roadway the full length of the national seashore and roads beyond its northern and southern boundaries *to connect with* existing road systems from the mainland to the island.
>
> "The national Park Service already has authority to construct within any area which it administers such roads and trails as are needed for public use of the area (act of Apr. 9, 1924, 43 Stat. 90, 16 U.S.C. §8). *The committee is of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it* and also that, considering the narrowness of the island, such a roadway might well spoil the very assets which the creation of the national seashore is intended to preserve. . . ." H.Rep. No. 2179, 87th Cong., 2d Sess., 1962; 1962 U.S. Code Cong. & Adm. Serv. 2717 (Emphasis added).

Finally, in 16 U.S.C. §8 Congress granted the authority to construct roads only to Interior. Interior's present plan to permit the State of California to build a road through Sequoia National Park is a delegation of power nowhere authorized by statute. It also confirms the absence of a park purpose.

The Secretary of the Interior has violated not only the Congressional mandate but his own administrative

guidelines as well. Interior's Park Road Standards Committee put it as follows:

> " . . . Park roads are not continuations of the State and Federal network. They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations." Park Road Standards, U.S. Department of the Interior, National Park Service, May, 1968.

The existence of a narrow, low-standard road (in place before Sequoia National Park was established) does not justify a new high-standard freeway along a parallel route.*

The new highway would not trace old ecological scars (A. 73). In order to produce a high volume of traffic, the proposed freeway must be on a new routing, with new and much larger cuts, fills and structures all productive of an adverse effect upon scenery, ecology and park values (A. 142).

The present road is neither "legal" nor "illegal" in the sense employed by the Ninth Circuit. The Secretary of the Interior was not called upon to authorize it since it was already there when Sequoia National Park was

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*Debate on one of the measures to expand Sequoia National Park confirms the legislative intent to restrict the location of new roads:

> "Mr. Rankin: How about roads and driveways through it?
> "Mr. Barbour: I will say to the gentleman it is proposed to make this a trail park and keep it a trail park. It is now a trail park. The roads now leading into the park go into the Giant Forest of the present park. This territory which it is proposed to add is in the high mountains further up and further back and there are no roads contemplated into this area at the present time." 67 Cong. Rec. 10143 (1926).

established. The Sierra Club does not challenge his exercise of discretion in permitting the old road to remain in use.

Even if the old road had been authorized by the Secretary operating within his authority, that could not determine the legality of every other highway connecting the same points. If this were the law, as suggested by the Ninth Circuit, any number of highways automatically would be legal whatever their route, size or even purpose as long as they had termini in common with the first road.

To recapitulate, the Ninth Circuit gave its blessing to the proposed highway on the basis of these propositions:

1. Notwithstanding 16 U.S.C. §1, requiring a park purpose, the Secretary of the Interior may authorize a freeway across a national park for a non-park purpose.

2. Notwithstanding 16 U.S.C. §8, which permits only the Secretary to build park roads, he may delegate the right to build those roads to others.

3. The fact that a minor, low-standard road in existence before the Park was founded already crosses it justifies a new freeway across the Park along a different route.

To state these propositions is to refute them. Judge Sweigert saw the matter correctly. The Ninth Circuit erred in reversing him.

**E. Interior Has Violated Its Own Rules And Abused Its Discretion In Failing To Conduct Hearings On The Freeway Across The Park.**

On January 29, 1969, the Secretary of the Interior adopted and published regulations entitled "Roadbuilding in National Parks" (34 Fed. Reg. 19 (January 29, 1969)). These regulations, quoted in relevant part in the Brief Appendix, call for both a corridor and a design public hearing in the case of "each major road project that would have a substantial social, economic, or environmental effect."

When the project involves improvement of an existing road, a single hearing is called for "if the project would have a substantial social, economic, or environmental effect."

The application of these rules to the proposed high-volume freeway could hardly be clearer. Under them, the Secretary of the Interior would have no choice but to grant a hearing prior to issuing a construction permit. When this lawsuit was filed, he was threatening to grant the permit without a hearing.

It is an elementary principle of administrative law that an agency must comply with its own regulations and that agency action taken in defiance of its own regulations is invalid without regard to the merits of the decision reached. *SEC v. Chenery Corp.*, 318 U.S. 80 (1942); cf. *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 387, 389 (5th Cir. 1966).

But the Secretary of the Interior, on April 21, 1969, purportedly revoked the "Roadbuilding in National

Parks" regulations, "effective immediately." His "revocation", as published in 34 Fed. Reg. 6985 (April 26, 1969) reads, in its entirety, as follows:

31

"Office of the Secretary

"ROADBUILDING IN NATIONAL PARKS

"Revocation of Procedures

"Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

"Issued in Washington, D.C. on April 21, 1969.

WALTER J. HICKEL,
Secretary of the Interior"

By statutory definition, repealing a rule is just as much "rule making" as formulating it in the first place. (5 U.S.C. § 551(5)). Secretary Hickel's "revocation" is completely inadequate and improper on numerous grounds set forth in the Administrative Procedure Act.

1. It does not give notice of proposed rule-making as required by 5 U.S.C. § 553(b). See also *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965);

2. It does not include a statement of the time, place, or nature of public rule-making proceedings as required by 5 U.S.C. § 553(b) (1);

3. It does not make a reference to the legal authority under which the rule (revocation) is proposed, as required by 5 U.S.C. § 553(b) (2);

4. It completely deprives interested persons of any opportunity to participate in the proposed rule-making in any way, shape or form, in violation of 5 U.S.C. § 553(c).

The Secretaries argued below that the protections set forth in 5 U.S.C. §553(c) were inapplicable to Secretary Hickel's purported revocation because the regulation dealt with matters which are excepted from its coverage. Concerning those exceptions, the District Court doubted whether the "rule calling for public hearing concerning major road projects having substantial social, economic or environmental effects is a mere rule of procedure, practice or policy" (A. 197).

The Ninth Circuit did not deal with these issues. It did not find that the purported revocation was effective or that a hearing was unnecessary. Instead, it attempted to find that any hearing requirement had been satisfied, referring to a hearing conducted by the State of California in 1967 and to a promotional meeting sponsored by the Tulare County Chamber of Commerce in 1953.

The 1967 State Division of Highways hearing was not the forum in which the limits of power of the Secretary of the Interior could be examined. But in any event, at that time, the Secretary was adamant in his opposition to the highway (A. 65).

Nor was the Tulare County Chamber of Commerce pep rally of 1953 (A. 43) a hearing in which the re-

quirements of the Secretary of the Interior's 1969 road building regulations could be met.

Even the Secretaries, in their opposition to the petition for certiorari, agreed that if the regulation was not repealed, a hearing was necessary (R.B. 13).

There is no evidence that Congress intended to exempt all rule-making activities of the Secretary of the Interior from the protections of the APA. Congress did intend to exempt from normal rule-making requirements those situations where "the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts".[19] We are not dealing with that exception here. The Secretary of the Interior holds national parks not in the absolute property ownership sense of a private citizen, but rather in trust to be maintained in their natural state for present and future generations.[20] This trusteeship requires that rules and regulations affecting those parks be open to public comment and participation.

The vice of the Secretary's abortive attempt to revoke the rule calling for hearings might have been insignificant if he had replaced the guarantee of public participation in road construction issues with a similar guarantee for all phases of the planning process. He stated.

> "Since the location and design of park roads is only one of several important factors in the planning process, it is not logical to single out the road con-

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[19]Congressman Walter, co-author of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 358 (1946).

[20]16 U.S.C. § 1.

struction aspect of planning for public discussion. All phases should be subject to comment from the public." (A. 74).

The Secretary has done nothing to make good on this promise and as to this most controversial highway whose purpose is to serve as a connecting link to a huge private resort, he has neither announced a public hearing nor solicited any public comment.

The purported "revocation" of the rule requiring hearings was invalid and ineffective. The Secretary's failure to comply with his own regulation was a continuing violation of law, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of 5 U.S.C. §706(2).

**F. Congress Alone May Authorize a Transmission Line Within Sequoia National Park.**

The Disney projec contemplates a 66,000 volt power transmission line across Sequoia National Park which would be constructed without Congressional approval (A. 39-40). The line would serve no park purpose, being intended solely to satisfy the energy requirements of Mineral King.

From his examination of 16 U.S.C. §45(c) together with other legislation dealing with the powers of Interior concerning location of poles and lines, Judge Sweigert questioned the power of Interior to authorize a transmission line in Sequoia National Park without obtaining Congressional approval.

Section 45(c), which applies specifically to Sequoia National Park, reads in relevant part as follows:

> " . . . *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

Judge Sweigert observed that 16 U.S.C. §5 is a general statute authorizing heads of departments with jurisdiction over public lands to grant easements for transmission lines. He noted that in the case of national parks, the statute requires a finding that such a line is compatible with the public interest (A. 195). He found that Section 45(c) with specific application to Sequoia National Park prevails over the general Section 5 (A. 194-195).

Another section dealing with the power of the Secretary is 16 U.S.C. 79 under which he may grant *revocable* rights of way for electrical poles and lines. This power is not relevant to the present situation since the transmission line would involve a large investment and would require a representation, express or implied, that the line could be maintained as long as power is needed at Mineral King.

In its attempt to avoid the plain language of Section 45(c), the Ninth Circuit referred to the Secretary's general power under 16 U.S.C. §5 and found that he may authorize a transmission line in the Park without Congressional action because it was unlikely that it was the "intention to require an act of Congress for each electrical line within the park . . ." (A. 232).

The Ninth Circuit did not read 16 U.S.C. §45(c) carefully. That section requires Congressional authorization not for every *electrical* line but only for that much narrower category of high voltage *transmission* lines.

The Ninth Circuit also accepted the proposition that Section 45(c) "was intended to apply only to the construction and development of hydroelectric projects and related facilities including power lines." (A. 232). To read 16 U.S.C. §45(c) is to reject this interpretation. It says that

> " . . . no permit, license, lease, or authorization for . . . transmission lines . . . *or* for the development, transmission, or utilization of power within the limits of said park . . . shall be granted or made without specfic authority of Congress." (Emphasis added).

If the intention suggested by the Ninth Circuit were correct, the phrase "transmission lines" could have been omitted.

Section 45(c) applies to any line intended to transmit power across Sequoia National Park for ultimate distribution elsewhere. As Judge Sweigert noted, it makes no "distinction between electric projects within or without the Park." (A. 195).

The section requires Congressional approval whether the transmission line is intended to serve a park purpose or not. While juxtaposed with another proviso concerning the power of the Secretary of the Interior, the section was not aimed at any particular agency of government to the exclusion of others. Instead, it was a general injunction.

The effect of the statute is that a transmission line to serve a park purpose in Sequoia National Park nevertheless would require Congressional approval. However, in addition, 16 U.S.C. §1 bars the Secretary from approving a line across *any* national park where, as in this case, that line was not intended to serve a park purpose. Both 16 U.S.C. §5 and 16 U.S.C. §79 are subject to this fundamental limitation. When the line would cross Sequoia National Park, they also are subject to 16 U.S.C. §45(c).

Judge Sweigert's opinion was in accord with the clear expression of Congress and it was error for the Ninth Circuit to rule otherwise.

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## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Ninth Circuit should be reversed.

May, 1971.

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**(Brief Appendix Follows)**

## BRIEF APPENDIX

### CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, A ticle IV, Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Administrative Procedure Act (as amended Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; 5 U.S.C. §§ 551, 553, 701-706):

5 U.S.C. § 551. Definitions:

For the purpose of this subchapter—

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

5 U.S.C. § 553:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons

subject thereto are named and [redacted] personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

• • •

5 U.S.C. §701:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 703:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 705:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or

otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1:

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 39 Stat. 535, 48 Stat. 389.

16 U.S.C. § 5:

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and

empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided,* That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application

under the provisions of this section subsequent to said date. 36 Stat. 1253; 66 Stat. 95.

16 U.S.C. § 8:

The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior. 43 Stat. 90.

16 U.S.C. § 41:

The tract of land in the State of California known and described as township numbered 18 south, of range numbered 30 east, also township 18 south, range 31 east; and sections 31, 32, 33, and 34, township 17 south, range 30 east, all east of Mount Diablo meridian, is reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon, or occupy the same or any part thereof except as hereinafter provided [in section 43 of this title], shall be considered trespassers and removed therefrom. 26 Stat. 478.

16 U.S.C. § 45c:

Nothing herein contained [in section 45a or 45b of this title] shall affect any valid existing claim, location, or entry heretofore established [prior to July 3, 1926], under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the

full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries herein established [by sections 45a-45e of this title] to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. 44 Stat. 820.

16 U.S.C. § 79:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufactur-

ing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under this section for any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given under this section for telegraph and telephone purposes shall be subject to the provision of sections 1-6, and 8 of Title 47, regulating rights-of-way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. 31 Stat. 790; 54 Stat. 43.

16 U.S.C. § 497:

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to

permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such mannner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. 70 Stat. 708.

16 U.S.C. § 528:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528-531 of this title are declared to be supplemental

to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests. 74 Stat. 215.

16 U.S.C. § 529:

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title. 74 Stat. 215.

16 U.S.C. § 530:

In the effectuation of sections 528-531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests. 74 Stat. 215.

16 U.S.C. § 531:

As used in sections 528-531 of this title, the followings terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the

national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. 74 Stat. 215.

16 U.S.C. § 551:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one [provisions of section 471 of this title], and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and

regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in Title 18 United States Code, Section 3401, subsections (b), (c), (d), and (e), as amended. 30 Stat. 35; 76 Stat. 1157; 78 Stat. 745.

16 U.S.C. § 688:

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of this Act [sections 688-689d of this title], are hereby designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands; *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under

and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established. 62 Stat. 861.

23 U.S.C. § 138:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. 80 Stat. 771; 82 Stat. 823.

48 U.S.C. § 341:

The Secretary of Agriculture, in conformity with regulations prescribed by him, may permit the use and occupancy of national-forest lands in Alaska for pur-

poses of residence, recreation, public convenience, education, industry, agriculture, and commerce, not incompatible with the best use and management of the national forests, for such periods as may be warranted but not exceeding thirty years and of such areas as may be necessary but not exceeding eighty acres, and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws: *Provided,* That nothing contained in this section shall prevent the said Secretary from canceling, revoking, or otherwise terminating a permit so issued upon proof of a breach of its terms and conditions or for other just cause. 62 Stat. 100.

49 U.S.C. § 1653 (f):

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site

of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife, and waterfowl refuge, or historic site resulting from such use. 80 Stat. 933; 82 Stat. 824.

**Forest Service Manual**

2711.1 *Annual Permits.* Annual permits:

* * *

3. Are issued on the Annual Special-Use Permit, Form 2700-4. The authorizing legislation will be cited on the permit form. Annual permits are subject to revision at any time because of change in laws or regulations. The Forest Service may amend the permit at any time, when it is in the public interest to do so, but the normal practice is to make such changes effective January 1, or the beginning of the payment period. Forest officers should discuss contemplated changes with the permittee at least 90 days prior to permit amendment.

* * *

5. Are generally authorized for use of short duration. They will be limited to the time actually needed for exercising the use privileges. Except for certain road permits (FSM 2730), a suitable termination clause will be included (FSM 2780). Existing permits will be so modified as time allows.

(October 1968)

2716.3 *Revocations.* In all cases of revocation, the permittee is entitled to adequate notice and the reasons for the action. If a breach is involved, he will be given an

opportunity to cure the breach before the revocation becomes final. Usually not more than 90 days should be granted to cure the breach. A reasonable period must be allowed for removal of improvements (FSM 2716.4).

The proposed revocation action must be reviewed by the attorney in charge.

1. Term permits may be revoked only:

a. When there has been a breach of the conditions of the permit and the permittee has been given an opportunity to show cause why the permit should not be revoked and has failed to do so.

b. When the land is required for higher public use. Action under this authority shall be fully explained to the permittee (applicable for term permits, as provided by clause 16 of form 2700-5 and 2700-15 and clause 23 of form 2700-17, thereof). This clause will be invoked only in cases when the land is needed for public purposes. Justification procedures to be followed in revoking a recreation residence permit for a higher public use are listed in FSM 2721.22f. Similar procedure will be followed for other types of uses.

c. By an officer superior in rank to the issuing officer.

2. An annual permit can be revoked for a violation of the terms or at the discretion of the Forest Service. Forest Service discretion to revoke will normally be exercised only:

a. When the land is needed for more important public purposes.

b. When the present use has become unsatisfactory or undesirable.

(October 1968)

The Secretary of the Interior's Rules for Roadbuilding in National Parks, 34 Fed. Reg. 19 (F.R. Doc. 69-1177; Filed Jan. 28, 1969), read in relevant part as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Adoption of Procedures

The procedures adopted herein are designed to ensure effective public participation in determining the location and design of major road projects in the National Park System administered by the Department of Interior. In addition, they require that full consideration be given to the potential social, economic, and environmental effects of each proposed project.

The following procedures are adopted, effective immediately, and apply to all major road projects in the National Park System administered by the Department of Interior.

(1) Coordination required. When the National Park Service begins considering the development or improvement of a major road it shall solicit the views of those Federal, State, and local agencies that it believes might be interested or affected by the development or improvement. A mailing list will be maintained upon which any such agency may enroll, upon request, to receive notice of projects in any area specified by that agency.

(2) Public hearings required. a. Both a corridor public hearing and a design public hearing will be held, or an opportunity afforded for those hearings, with respect to each major road project that:

(1) Is on a new location; or

(2) Would have a substantial social, economic, or environmental effect.

b. A single combined corridor and design public hearing will be held, or the opportunity for such a hearing afforded, on all other projects before a location is approved, except as provided in subparagraph 2.c below.

c. Hearings are not held on a project that is solely for such improvement as resurfacing, widening existing lanes, adding auxiliary lanes, replacing existing grade separation structures, and installing traffic control devices or similar improvements, if the project would not have a substantial social, economic, or environmental effect.

d. An opportunity for another public hearing will be afforded in any case where proposed locations or designs are so changed from those presented, in the notices specified below or at a public hearing, as to have a substantially different social, economic, or environmental effect.

* * *

(7) Definitions. a. A "corridor public hearing" is a public hearing that:

(1) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for and the general location of, a major road; and

(2) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative locations, and the social, economic, and environmental effects of those alternate locations.

b. A "design public hearing" is a public hearing that:

(1) Is held after the major road location has been approved, but before design approval;

(2) Is held to ensure that an opportunity is afforded for effective participation by interested

persons in the process of determining the specific location and major design features of a major road; and

(3) Provides a public forum that affords a full opportunity for presenting views on alternative design features, including the social, economic, environmental, and other effects of alternate designs.

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses such as:

(1) Public health, safety and welfare.

(2) Conservation, including erosion, sedimentation, wildlife and general ecology of the area.

(3) Use of recreational areas and parks.

(4) Natural and historic landmarks.

(5) Aesthetics.

(6) Noise, and air and water pollution.

(7) Fire protection.

(8) Fast, safe, and efficient transportation.

(9) Engineering, right-of-way, and construction costs of the project and related facilities.

(10) Maintenance and operating costs of the project and related facilities.

(11) Operation and use of existing road facilities and other transportation facilities during construction and after completion.

d. "Major roads" means the main entrance roads and arteries of the park circulation system.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered will be given equal weight in making a determination upon a particular major road location or design.

Issued in Washington, D.C., on January 18, 1969.

STEWART L. UDALL,
*Secretary of Interior*

The Secretary of the Interior's notice of revocation of Rules for Roadbuilding in National Parks, 34 Fed. Reg. 6985 (F.R. Doc. 69-4993, Filed, April 25, 1969), reads in its entirety as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Revocation of Procedures

Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

Issued in Washington, D.C., on April 21, 1969.

WALTER J. HICKEL,
*Secretary of the Interior.*

# AMICUS CURIAE BRIEF

## INDEX

PAGE

## TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes: – continued PAGE



Other Authorities:

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

**No. 939**

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Sierra Club,

*Petitioner,*

*v.*

Rogers C.B. Morton, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR THE NATIONAL ENVIRONMENTAL LAW SOCIETY AS AMICUS CURIAE

### INTEREST OF AMICUS CURIAE

The National Environmental Law Society is a nonprofit corporation organized under the Laws of the State of California with national headquarters at Stanford University School of Law. The Society is composed of student chapters functioning in fifty-two major law schools throughout the United States. Chapters are in such schools as Boston University, Cornell, Fordham, George Washington, Harvard, Hastings, Rutgers, St. John's, Stanford, Syracuse, the Universities of: Arkansas, California (Berkeley [Boalt Hall], Davis and Los Angeles campuses), Chicago, Colorado, Florida, Illinois, Maryland, Michigan, Oregon, Pennsylvania, Santa Clara, Texas, Utah, Virginia, Washington, and Wisconsin, Vanderbilt and Yale Universities and many others.

The primary purposes of the National Environmental Law Society are to promote the study of legal skills and disciplines related to the attainment of high environmental quality and the

conservation of resources. This is accomplished by encouraging law schools to include the study of environmental law within their curriculum, by disseminating information regarding environmental law, by aiding through research and volunteer effort those legal actions which truly seek to protect environmental quality. The aim of the Society is not to prepare future and present attorneys for vexatious litigation, but to instill a knowledge and awareness of the need to protect, preserve and restore our Nation's environmental and natural resources (both animate and inanimate) for all people recognizing that we hold America in trust for future generations.

The two individuals who prepared this brief Michael Bauernfeind and Peter Heiser, Jr., are students at the University of Santa Clara School of Law who share the Society's aims and purposes.

We address ourselves solely to the issue of standing because we feel it is particularly important that the United States Supreme Court announce a rule of standing favorable to environmental litigants asserting the public interest. We reserve discussion of the merits of this case to the parties directly involved.

This brief is filed with the written consent of all parties pursuant to United States Supreme Court Rule 42(2).

## SUMMARY OF ARGUMENT

The law of standing has caused confusion in the federal court system for many years. Though in past years only those litigants who had suffered a true economic injury were granted standing to have their claims adjudicated, in recent years many courts throughout the federal system, including this United States Supreme Court, have recognized that economic loss is *not* the only measure of injury. Very real loss to the entire nation occurs when natural resources are rapaciously consumed, and when our environment is choked by man's waste, or when a wildlife species faces extinction – yet these losses, these "social costs," are incapable of expression in finite dollar and cent terms. Those who seek to protect and preserve our natural and environmental heritage for present and future generations by

petitioning our courts for a redress of grievances when governmental agency action adversely affects our environment are sometimes told that they have no standing to litigate their claims – they allege no conceivable injury to themselves. When this happens, and a governmental agency is allowed to pursue an environmentally detrimental course of action, rather than pursuing another less deleterious course of action or taking no action at all, we all suffer the loss in very real – yet non-economic – terms.

Most Acts of Congress which relate to the use of our lands, waters and the like express a national congressional purpose and intent to preserve and care for our bounty if at all possible. Too often, the cold, abstract figures representative of competing economic interests cause federal agencies to give too little consideration to this national policy. Those persons economically injured by agency action have ready access to the federal courts if Congress has expressed in some statute the general intent to protect their particular interests, but those representing the non-economic interest of the public in our environment often fail to pass the standing barrier.

Increasing national concern over environmental quality and natural resources and wildlife, perhaps prompted in part by a history of litigation by concerned environmentalists, is evidenced in many new Acts of Congress, some specifically enacted to protect our Nation's natural heritage. In spite of this, the right of a litigant to assert non-economic injury to the environment in behalf of the general public is not recognized in some federal courts – and specifically is not recognized by the United States Court of Appeals for the Ninth Circuit. In this troubled era, where many with grievances have taken to the streets, those who seek to protect the public interest in our environment have sought help from a more appropriate forum, the courts. It is imperative that this Court firmly establish a right of standing in the federal courts for those who litigate in the public's behalf, seeking not money, but justice.

At no other time has a case on standing been heard by this Court where the petitioner asserted such a purely non-economic injury as the Sierra Club does now. Because of this, the Court has an opportunity to make a clear pronouncement of law elim-

inating forever the standing barrier for environmentalists who shoulder the burdensome costs of litigation for us all.

On behalf of this generation and those of future generations, we heartily urge the United States Supreme Court to use this opportunity to strike down the standing barrier presently faced by the environmental litigant.

## I. SOUND PUBLIC POLICY AS WELL AS SPECIFIC CONGRESSIONAL AND EXECUTIVE EXPRESSIONS OF NATIONAL ENVIRONMENTAL POLICY REQUIRE THAT PERSONS INTERESTED IN ENVIRONMENTAL PROTECTION BE GRANTED STANDING TO CHALLENGE AGENCY ACTION ALLEGEDLY DELETERIOUS TO THE ENVIRONMENT.

Though the study of the relationships between organisms and the environment, ecology, has been a recognized scientific discipline since its introduction over one hundred years ago by Vermont lawyer, George Perkins Marsh, we have waited until recent years to heed its teachings. As we look at this Nation's polluted waters, eroded and stripped soil, endangered and extinct wildlife species, and the profligate consumption of our natural resources, we must wonder if man has not waited too long in recognizing the need to *apply* the science of ecology.

George Marsh expressed the belief that man was trapped in his environment and that this trap would ultimately lead to civilization's destruction.[1] Only now, as our natural resources and raw land disappear and environmental pollution chokes much of this Country, are Marsh's warnings beginning to cause serious national concern. Recently, noted scientist, Clarence C. Gordon, of the University of Montana, stated that this "nation just hasn't the time to wait to correct these environmental insults."[2]

Because Yellowstone was threatened with exploitation and commercialization, Cornelius Hedger, a Montana judge, and other far sighted conservationists sought to establish our first National

1. Russell, *The Vermont Prophet: George Perkins Marsh*, HORIZON, Summer 1968, at 16.

2. Gordon, *Can Law Reclaim Man's Environment?*, TRIAL, August/September 1969, at 10.

Park, the first national park in the world, in 1872.[3] Since then the concept of preserving our national heritage in trust for posterity has been so well accepted that there are now many millions of acres under either National Forest Service or National Park Service control. Since the heads of the Department of Agriculture and Department of Interior who, respectively, control these two Services are cabinet appointees who change with each new administration and its policies, there is a need to assure that there is a continuing policy to preserve and protect the lands held in public trust. The practical exigiences of any given administration may act in such a way that these trusts are compromised. In the case at bar, great political pressures have been exerted by the citizens of Tulare County, citizens of the Los Angeles area and those who would benefit from the commercial development of Mineral King. The Forest Service itself stands to realize substantial annual fees from the developed projects.[4] Thus, it should be apparent that the best guardian of the public right and public interest is not, exclusively, a government agency, but, rather, the vigilance and concern of the American public in demanding that congressional expressions of national policy be followed. With the protection and restoration of the environment in mind, many conservation and environment -minded individuals and groups have taken on the task of trying to save our environment. Realizing the limitations of educational and legislative processes in preventing specific destruction of our resources, environmentalists have sought the aid of a responsive judiciary in requiring governmental agencies to give proper effect to sound environmental policy already enacted into law. Additional enlightened social legislation concerned with environmental protection has followed this wave of litigation. But, in spite of this, almost every identifiable social or economic interest group, as well as most federal agencies, is

3. 16 ENCYCLOPEAEDIA BRITANNICA, *National Parks and Reserves* 66 (1968).

4. Sims, *Mineral King: Battleground On Use of Public Lands,* Los Angeles Herald Examiner, *editorial,* 7th Sept. 1969.

actively engaged in the destruction of the environment.[5] As Professor Arnold Reitze, Jr., points out, many federal agencies work at cross purposes:

> The Department of Agriculture has paid North Dakota farmers to drain land, while the Department of the Interior spends money to create and protect such wet lands for wild fowl breeding; the Department of Agriculture pays to remove lands from agricultural production, while the Bureau of Reclamation spends large sums of money to create agricultural lands; the Army Corps of Engineers dredges harbors in such a manner as to increase the pollution problems the Federal Water Pollution Control Administration is attempting to abate. Examples of these inconsistent government activities are legion, and they are largely the result of numerous agencies that represent specialized economic interests.[6]

Congress, recently, has recognized the problem of inadequate consideration by federal, as well as state and local, agencies of the environmental consequences of their actions and has passed several Acts designed to promote preservation of our natural resources.[7] Even after this congressional expression of national policy, many agency actions require a balancing of opposing economic and social interests. When an agency does

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5. See generally: S. UDALL, THE QUIET CRISIS (1963) HERFINDAHL AND KNEESE, QUALITY OF THE ENVIRONMENT 35, 65 (1965); STILL, THE DIRTY ANIMAL 239 (1967); CAUDILL, NIGHT COMES TO THE CUMBERLANDS (1962); LIFE, 12th January 1968 at 54; W. DOUGLAS, A WILDERNESS BILL OF RIGHTS 147 (1965); The New York Times, 3rd January 1968 at 96; U. S. DEPARTMENT OF THE INTERIOR, WASTES FROM WATERCRAFT, S. Doc. No. 48, 90th. Cong., 1st Sess. 3 (1967).

6. Reitze, *Pollution Control: Why Has it Failed?*, 55 A. B. A. J. 923, 926 (1967).

7. Among them: Environmental Education Act, 20 U.S.C. § 1531; Air Quality Act of 1967, 42 U.S.C. § 1857 *et seq.*; National Environmental Policy Act, 42 U.S.C. §§4321–4347; Environmental Quality Improvement Act of 1970, 42 U.S.C. §§4372–4374.

not consider both of the opposing interests, those "aggrieved" by such action should have the right to judicial review.

As stated in *Scenic Hudson* (354 F.2d at 624), a "Commission's * * * proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered." There is no technical formula by which we may weigh the opposing interests. Just as a court may readily consider the wilderness value of a national forest as opposed to the dollar revenue to be realized from the cutting of trees (as in *Parker v. U.S., infra*), so may courts decide whether construction of a major roadway is in accordance with "the national policy that special efforts should be made to preserve the natural beauty of the countryside." [Department of Transportation Act, 49 U.S.C. §1651(b)(2)]. Because the legislature acts upon projected problems of general concern, what may not be apparent to the legislature when the whole forest is viewed may be of vital concern when the judiciary acts specifically and empirically in an adversary setting to examine a single tree.

Professor Davis regards the comparative expertise of administrative agencies and courts as follows:

> The courts, not the agencies, are comparatively the experts in * * * constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation * * * [and] *most analysis of legislative history.* [Emphasis added.][8]

Where but in the courts will we gain the benefit of such enlightened reasoning as emanated from this court in the *High Mountain Sheep* case [*Udall v. FPC*, 387 U.S. 428 (1967)] to the effect that in any case involving a project which proposes elimination of or encroachment upon a significant resource, one relevant factor which must be considered is whether the project

8. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.09 at 241 (1958).

should be undertaken at all, in addition to consideration of proposed alternative dispositions of the resource:

> The test is whether the project will be in the public interest and that determination can be made only after an exploration of all issues relevant to the "public interest," including * * * the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife. 387 U.S. at 450.

Where but in the courts will be gain from a liberal interpretation of the legislative history of a congressional statute such as was rendered by this Court in the case of *United States v. Standard Oil Co.*,384 U.S. 224 (1966). Even a thorough reading of the Senate Report concerning the history of Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. §407) reveals that the Senate was not concerned with the pollutant effect of waste discharges, but only with their effect upon navigibility.[9] The *Standard Oil* decision shows the willingness of the Court to interpret statutory history in the light of sound, current public policy and necessity. Thus, the Court cited Senate remarks on "the discharge of sawmill waste into streams" and injury to channels by "deposits of ballast, steam-boat ashes, oysters, and rubbish from passing vessels" (384 U.S. at 228-229) to imply a congressional concern with pollution.

Because of the recent passage of several congressional acts and issuance of Executive Orders designed to protect the environment, particularly the National Environmental Policy Act (NEPA) [42 U.S.C. §§4321-4347] and Executive Order 11514 pursuant thereto,[10] the Court could base a decision recognizing standing for environmentalists on these current clear expressions of national policy. But, because the most demanding of these Acts, NEPA, merely requires *preparation* of environmental

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9. See: S. Rep. No. 244, 50th Cong., 1st Sess. 1-2 (1887).

10. EXECUTIVE ORDER 11514, *Protection and Enhancement of Environmental Quality*, 35 Fed. Register 4247, 7th. March 1970. See also other environmental statues reported in footnote 7, *supra*.

impact statements by federal agencies undertaking "major" actions [42 U.S.C.§4332(c)] and not an agency decision *necessarily* guided by the findings therein, we urge this Court to express the law of standing on more traditional grounds for those who seek to protect our natural resources through litigation.

There are many instances where challenged agency action affects or economically injures no single person or group directly, but adversely affects the public interest generally because of an irreversible loss of a natural resource or wildlife species or other injury to the environment. There are many issues, such as a suit to protect an endangered species, or protection of a wilderness area, or preservation of a high mountain lake or stream, to name but a few, which could not be judicially challenged by a "traditional plaintiff" -for none exists. No individual suffers a true "economic loss" in such a case, but we all suffer from the environmental loss. If a group or individual representing the public's interest in the environment possesses the requisite "interest and adversity" to maintain a costly lawsuit in the federal courts, should he not be deemed sufficiently "aggrieved" to have standing to maintain that action? When an individual is adversely affected by governmental action, he must first exhaust whatever administrative remedies are available to him. Once these have been exhausted, there are realistically two forms of action left; civil disobedience or relief in the courts. When those aggrieved are denied standing even to present their grievances before the courts, the only other alternative is one which is repugnant to a well ordered society. We submit that the legitimate channel for protest, the courts, should be open to those asserting the public interest. Another alternative to allowing a challenge of agency action by such litigants is to allow a significant number of grievances to go judicially unnoticed for want of a person "injured" in the traditional sense who might be willing to bring the action in his own behalf. Some would raise the cry that standing for environmental litigants would "flood the courts" with their litigation. To them we reply with this Court's own words in the *Flast v. Cohen* decision, 392 U.S. 83, 93-94 (1968) and the concurring opinion of Justice Douglas at 112:

> There need be no inundation of the federal courts if [such] suits are allowed. There is a wide judicial discretion that can usually distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing and the like.

In conclusion, we submit that when The Bible, speaking of Creation [2 *Genesis* §26 (Wilderman Co. ed 1911)], says: "Let us make man to our image and likeness: and let him have dominion over the fishes of the sea and the fowls of the air, and the beasts, and the whole earth, and every creeping creature that moveth upon the earth," this does not give man the right to destroy the earth and its creatures, unchallenged. Recent heightened concern over our environment has been labeled a fad. If so, it may well be the last fad.

## II. THE BACKGROUND AND DEVELOPMENT OF THE LAW REGARDING STANDING REVEAL THAT, THOUGH THE CONCEPT IS STILL AMORPHOUS, ITS APPLICATION IS BECOMING LESS RESTRICTIVE.

Standing has become one of the more perplexing areas of the federal law. As a general rule, one who asserts violation of a constitutional or statutory right must demonstrate that he has suffered some direct and immediate injury as a result of the challenged action. Without these required allegations, federal courts will rule that the claimant has no standing and refuse to decide the issues.

This requirement of standing often operates as a self-imposed federal court rule of judicial restraint to avoid deciding "unimportant" issues, while, at other times, it is also said to be a part of the Constitution's article III, §2 limitation of federal judicial power to "cases and controversies." Unfortunately, it is not often easy to distinguish between these two uses of the standing concept.

Historically, taxpayers have not had standing to challenge allegedly unconstitutional federal expenditures.

In *Frothingham v. Mellon*, 263 U.S. 447 (1923), the U.S. Supreme Court ruled that taxpayer interest in such matters is too remote, indeterminate, and minute, and that injury suffered is suffered in common with people in general so that an individual taxpayer should have no standing to sue. In this instance, standing was denied as a matter of self-imposed judicial restraint.

More recently, the Court ruled in *Flast v. Cohen* 392 U. S. 83 (1968), that a federal taxpayer may challenge a particular federal expenditure if he alleges that it is part of a spending program which exceeds *specific* constitutional limitations. Perhaps the Court was also aware of the fact that, on the basis of 1923 income taxes, the interest of any one taxpayer or small group of taxpayers was so minute that it would not constitute a basis for standing, whereas, given an individual's present tax burden, a federal taxpayer's interest in any given program may still not be "significant," but is definitely not "minute."[11] Perhaps this decision was a small recognition of the substantial effect of federal action on the life of an individual. Although the issue litigated was quite specialized, the *Flast* decision has contributed greatly to a general liberalization of the law of standing.

The next year, the U. S. Supreme Court reconsidered the problem of standing in *Jenkins v. McKeithen*, 395 U. S. 411 (1969), and noted that the concept of standing "is surrounded with the same complexities and vagaries that inhere in [the concept of] justiciability" in general. *Id.* at 423. The Court then reiterated the basic, indispensible requirement for standing that was set forth in *Baker v. Carr*, 369 U. S. 186 (1962), that the party seeking relief allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204; *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969). The Court, in *Jenkins*, went on to state that "[i]n this sense, the concept of standing focuses on the party seeking relief, rather than the precise nature of the relief sought." 395 U.S. at 423.

11. Karabus, *The Flast Decision on Standing of Federal Taxpayers to Challenge Governmental Action: Mirage or Breach in the Dike?*, 43 N. DAK. L. REV., 353, 356 (1969).

Most recently, the U. S. Supreme Court again faced the problem of standing in two cases decided the same day, *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150 (1970), and *Barlow v. Collins*, 397 U. S. 159 (1970), and promulgated a new two-step test for standing. The first step requires a determination of "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 379 U. S. at 152. If such injury is alleged, the Court then inquires "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U. S. at 153 though Justice Brennan, joined by Justice White, argued vigorously against the "zone of interest" requirement of the second, nonconstitutional, step, they were unable to convince the majority, and the second "test" remains as a confusing portion of the standing barrier. 397 U. S. at 167 *et seq.* Professor Louis L. Jaffe, commenting recently on the *Data Processing* and *Barlow* cases[12] states that the most significant development in the area of standing, and in the whole field of administrative law, is that individual and organizational plaintiffs whose concern is not specifically economic or who represent citizen interests in various forms have gained the right to litigate. He feels that this development has introduced new life into the administrative process by compelling it to respond to previously underrepresented forces and values. 84 HARV. L. REV. at 633.

12. Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971). Though Professor Jaffe agrees that the second part of the new two-step test is an unnecessary and inappropriate part of the requirement for standing, he feels that it may serve a valid purpose by placing control of the legal situation within the descretion of federal judges to grant jurisdiction of any particular suit. With this conclusion, we respectfully disagree. We feel there is a need for a rule of standing which will virtually *guarantee* the right of plaintiffs representing certain non-economic public interests to challenge in federal courts governmental action which disregards and injures those interests. The matter of jurisdiction should not be allowed to be used as a subterfuge under which standing is denied. The two considerations are separate and distinct.

Professor Davis summed up the standing problem when he stated:

> A plaintiff who seeks to challenge governmental action has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether a plaintiff has a legal right, but the question whether a plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.
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> 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §22.04 at 217 (1958).

It is no wonder that standing is regarded as one of the most amorphous concepts in the field of law. New U. S. Supreme Court decision which seem to promulgate new rules and guidelines are more useful in clarification of earlier decisions than in providing substantive guidelines for prospective litigants. Even the U. S. Supreme Court refers to the standing concept as a "complicated specialty of federal jurisdiction," *U. S. ex rel. Chapman v. FPC*, 345 U. S. 153, 156 (1953). The opinion of the court (*per* Judge Tamm) in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D. C. Cir. 1970), after providing a fine review of the problem of standing, declares that when Congress lays down guidelines to be used in carrying out its mandate in some specific area, a procedure should exist whereby those injured by arbitrary and capricious actions of some governmental agency official who has ignored those guidelines may "vindicate their very real interests, while at the same time furthering the public interest." 424 F.2d at 864. With this contention, we heartily concur! Anyone who must face the standing barrier would agree that such a procedure *should*

exist. All too often, federal courts find that no such procedure exists and, therefore, deny standing. Certainly, the environmental litigant is often forced to spend large sums merely to adjudicate the threshold issue of standing, sometimes unsuccessfully, before he is allowed to pursue his case on the merits. In this era of increasing environmental degradation and a heightened national awareness of the need for environmental protection, restoration and control, the fact that environmental litigants may not be allowed to argue the merits of their contentions because of an inability to pass the standing barrier is indeed unfortunate. One of the problems with the present two part test for standing is that in order to determine whether a plaintiff comes within the "zone of interest of a relevant statute," a court must look to the merits of the case to see if there is a Congressional intent expressed in a particular statute to protect the interest plaintiff asserts. In essence, the merits are preliminarily decided without the petitioner being allowed to present his case. Justice Brennan's premonition, expressed in his *Barlow* dissent, that the "Court's approach does little to guard against the possibility that judges will use standing to slam the door against plaintiff's who are entitled to full consideration of their claims on the merits," (397 U.S. note 19 at 165), did in fact occur in the 9th Circuit's decision of the case presently at bar.

### A. Standing Is Now Granted To Many Litigants Who Assert Non-economic Interests, Particularly Those Who Assert The Public's Interest In Environmental Protection.[13]

Regarding the "zone of interest" concept of the *Data Processing* case, the U.S. Supreme Court declared:

> That interest may, at times reflect "aesthetic, conservational, and recreational" as well as economic values. *Scenic Hudson Preservation Conf. v. Federal Power Commission*, 354 F.2d 608, 616 [(2d Cir. 1965)]; *United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 [(D.C. Cir. 1966)]. * * *

13. For a comprehensive discussion of problems affecting environmental litigants see: Heiser, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAWYER ___ (1971).

> We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here." 397 U.S. at 154.

The Court further states that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." 397 U.S. at 154. This is a rather authoritative pronouncement, through dicta, by the Court, but the question remains: What constitutes a "class of people who may protest?"

Examining, first, the *Scenic Hudson* case, cited by the Court as supporting the right of litigants reflecting aesthetic, conservational, and recreational values to be in court, one finds that the two conservation groups which organized Scenic Hudson had no property interest in the area. Aside from the claim that one of the groups maintained trailways in the area of Storm King Mountain, some of which would have been inundated by the project, the environmental groups represented no economic interest, yet the court granted them standing in their own behalf – not merely because three towns also joined in the suit. To assure proper consideration by the FPC of the non-economic interests of the conservation groups in preserving an rear referred to as one of the finest pieces of river scenery in the world, the court held that "those who by their activities and conduct have exhibited a *special interest* in such areas, must be held to be included in the class of 'aggrieved' parties under § 313 (b) [of the Federal Power Act, 16 U.S.C. § 825 (b)]." 354 F.2d at 616. [Emphasis added.]

The next case referred to by the Court in its *Data Processing* decision as exemplifying the fact that standing may stem from non-economic values is *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In this case, listeners and would-be listeners of a radio station, who alleged no economic injury, petitioned the court for the right to intervene in a license renewal proceeding before the FCC. The court's well reasoned opinion per Judge (now Chief Justice) Burger held that the listeners

were responsible members of the consuming public who in some sense "consume" or would "consume" the product of the broadcast industry and, thus, had standing to represent the public interest. Reasoning that the "concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* at 1002. Who but the general public, and in particular a group with such an obvious concern as the Sierra Club, are "consumers" of our national forests and other natural resources? The 9th Circuit, obviously, does not apply such a test. When addressing itself to the question of what particular group or individual should be granted standing to represent the public interest in court or before a federal agency, the court stated in *United Church of Christ:*

> The responsible groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional associations, unions, churches, and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; *they usually concern themselves with a wide range of community problems and tend to be representative of a broad as distinguished from narrow interests, public as distinguished from private or commercial interest.* 359 F.2d at 1005. [Emphasis added.]

Reviewing the theory that a governmental agency itself is presumed to effectively represent the interest of the public "without the aid and participation of legitimate[citizen]representatives fulfilling the role of private attorneys general," the court stated that this was "one of those assumptions we collectively try to work with so long as they are adequate." *Id.* at 1003, 1004. The court reasoned that it could no longer believe such an assumption was valid if it became clear that it failed to stand up under the realities of actual experience and that the "gradual expansion

and evaluation of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide." *Ibid.*

In another "early" case which considered the standing of litigants representing non-economic conservation interests, *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967), the court ruled that a town, a civic association of residents of the town, two wildlife sanctuaries whose property would be affected by the proposed road, people whose property would be taken for the road, as well as a non-profit organization concerned with community problems *all* were entitled to standing under the *Scenic Hudson* rationale. The court found no reason why the word "aggrieved," as contained in the Administrative Procedure Act (5 U.S.C. § 702), the statute under which petitioners challenged, should not be interpreted as manifesting a congressional intent to confer standing on groups whose interests were allegedly disregarded by a government agency – just as the word "aggrieved" contained in the Federal Power Act was found, in *Scenic Hudson*, to confer standing. Though the court felt its decision to grant standing to plaintiffs who previously were not formal parties to any administrative proceedings might be an extension of the *Scenic Hudson* doctrine, it decided the extension was warranted by the rationale of that decision. 270 F.Supp. at 660, 661.

More recently, an unincorporated association of citizens residing near a proposed expressway, the Sierra Club, and the Village of Tarrytown, New York, initiated action in district court against the U.S. Secretary of Transportation and others in *Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083 (S.D. N.Y. 1969). The court had no difficulty granting standing to the Village due to its allegation of direct economic loss. Regarding the standing of the Citizens Committee and the Sierra Club, the court found the problem more acute because they had no personal economic claim to assert, but ruled that they were sufficiently "aggrieved" by the alleged destruction of the natural resources of the river to maintain the court action.

The court reasoned that the *Scenic Hudson* and *Road Review* cases created standing if the court could find "a 'legislative intent' to create standing, absent a monetary claim, in the various statutes involved," and that when statutes involved in a controversy are themselves concerned with the protection of natural, historic, and scenic resources, then "a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency." 302 F.Supp. at 1092. In affirming the lower court decision, *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert. denied* 400 U.S. 949 (1970), the circuit court confirmed the standing of the conservation groups though the Rivers and Harbors Act of 1899 (33 U.S.C. §§401-406 K) contains no specific review provision (as did the Federal Power Act relied upon in *Scenic Hudson*). The court stated:

> Nevertheless, persons "aggrieved" by agency action pursuant to that statute are entitled to review on similar terms by the Administrative Procedure Act. We agree with the conclusion of Judge McLean in *Road Review League v. Boyd*, 270 F.Supp. 650, 661 (S.D. N.Y. 1967) that the meaning of "aggrieved" in one act is not different from its meaning in the other. Section 702 of the Administrative Procedure Act provides that a person "aggrieved" by agency action within the meaning of a relevant statute is entitled to judicial review thereof. 425 F.2d at 104.

The court identified two relevant statutes as well as a regulation requiring the Army Corps of Engineers to consider the environmental effects of projects it approves[14] and concluded:

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14. The Department of Transportation Act, 49 U.S.C. § 1653(f) [which declares a national policy to preserve the natural beauty of the countryside and requires consideration of environmental values when considering routes]; the Hudson River Basin Compact Act, 89 Stat. 847 (1966) [which describes the immense recreational and aesthetic values of the Hudson River Basin]; and Army Corps of Engineers Regulation, 33 C.F.R. 209.120(d).

> Thus administrative as well as congressional concern for natural resources in the present exercise of federal authority is evident. We hold, therefore, that the public interest in environmental resources – an interest created by statutes affecting the issuance of this permit – is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest. 425 F.2d at 105.

The plaintiffs evidenced the seriousness of their concern with local natural resources, said the court, by the fact that they organized for the purpose of cogently expressing that concern, that the intensity of their concern was apparent from the great expense and effort they undertook to protect the public interest they believed to be threatened by official action of governmental agencies, and that they "proved the genuineness of their concern by demonstrating that they [were] 'willing to shoulder the burdensome and costly processes of intervention' in an administrative proceeding." *Id.* at 104.

In *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), the court's consideration of standing led to a ruling that "the consumer's interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem." *Id.* at 1097. In this case, five conservation organizations which engaged in activities relating to environmental protection (the Enviornmental Defense Fund, National Audobon Society, Sierra Club, West Michigan Environmental Action Council, and Izaak Walton League, *intervenor*) challenged the U.S. Department of Agriculture's certification of DDT and requested that the pesticide's use be suspended. Applying the new *Data Processing* and *Barlow* two-step test for standing, the court ruled that "the biological harm to man and other living things" from continued use of DDT was sufficient allegation of "injury" by petitioners to satisfy the first part of the test and that the "zone of interests"

requirement was satisfied because the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§135 – 135 K) was designed to protect "not only the economic interest of the registrant but also the interest of the public in safety." 428 F.2d at 1096. In *Parker v. U.S.*, 309 F.Supp. 593 (D. Colo. 1970), several groups (including the Sierra Club), a town, and a magazine successfully brought suit to enjoin the sale of timber from a National Forest in Colorado. In an earlier declaratory judgment action before the same court, *Parker v. U.S.*, 307 F.Supp. 685 (D. Colo. 1969), the matter of the plaintiffs standing was resolved in their favor when the court concluded:

> It cannot be denied that plaintiffs are advancing the public interest; also they have special interest in the values Congress sought to protect by enacting the * * * statutes [under which the petitioners challenged the proposed sale]. We conclude that these statutes confer on groups and individuals such as the plaintiffs the status of "aggrieved persons" when the Secretary of Agriculture or the Forest Service fails to comply with the mandatory requirements of the Acts. 307 F.Supp. at 687.

More recently, another U.S. District Court ruled favorably regarding the standing of environmentalists in *E.D.F. v. Corps of Engineers*, F.Supp. No. LR-70-C-203 (E.D. Ark., *decided* 19th Feb. 1971), 2 ERC 1260 (BNA Environment Reporter), after a review of the requirements of *Data Processing* and *Barlow*. The court agreed with Judge Hamley's dissent, expressed in the 9th Circuit's decision on the case presently at bar (*Sierra Club v. Hickel*, 433 F.2d 24, (9th Cir. 1970), that:

> [T]he rationale of *Data Processing* and the other Supreme Court decisions, if not the precise holdings, clearly indicates that such plaintiff organizations as those involved in such cases have standing to sue. There can be no doubt that the corporate

plaintiffs are interested and antagonistic enough to present the issues vigorously and with the "concrete adverseness" referred to in *Baker v. Carr* [citations omitted]. Furthermore, at least one of the acts relied upon by the plaintiffs, the National Environmental Policy Act of 1969, makes clear the recognition by Congress of the important role of such private organizations by requiring all federal agencies to cooperate with "concerned * * * private organizations to further the policies of the Act. 2 ERC at 1282.

The cases outlined above, as well as a host of other cases,[15] would seem to indicate that a demonstrated interest,

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15. The following are additional decisions in which the rationale of the *Citizens Committee* and *Scenic Hudson* has been followed to grant standing to those who would challenge agency decision-making with regard to environmental or other public interest issues.

*Environmental Cases*

*Nashville I-40 Steering Committee v. Ellington*, 387 F. 2d 179, 180-181 (6th Circ. 1967), *cert. denied* 390 U.S. 921 (1968) [Federal Aid Highway Act of 1966, 23 U.S.C. §138]; *Gandt v. Hardin*, Civ. No. 1334, *unreported* (W.D. Mich., *decided* 11th Dec. 1969), *dismissed on other grounds:* 1. On the merits because the agency action was not arbitrary and capricious and 2. Laches [Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§528-531]; *Crowther v. Seaborg*, 312 F.Supp. 1205 (D. Colo. 1969), *affirmed* 415 F.2d 737 (10th Cir. 1969) [Atomic Energy Act, 42 U.S.C. §§2012-2013, 2051]; *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, ___F.Supp.___, Civ. No. 70-82E (N.D. W. Va., *decided* 15th June 1970), *on appeal to 4th Cir.* [Multiple Use-Sustained Yield Act, *supra*, and Wilderness Act of 1964, 16 U.S.C. §1131]; *Pennsylvania Environmental Council v. Bartlett*, 315 F.Supp. 238 (M.D. Penn. 1970) [National Environmental Policy Act of 1969, 42 U.S.C. §4321]; *Izaak Walton League v. St. Clair*, 313 F.Supp. 1312 (D. Minn. 1970) [Wilderness Act, 16 U.S.C. §1131 (a)]; *Texas Committee on Natural Resources v. U.S.*, ___F.Supp.___, Civ. No. A-69-CA- 119 (W.D. Tex., *order granting stay* 5th. Feb. 1970), 1 ERC 1303 [National Environmental Policy Act, *supra*]; EDF *v. Corps of Engineers*, ___F.Supp. ___, Civ. Ac. No. 2655-69 (D. D.C., *memorandum opinion* 27th. Jan. 1971) [NEPA, Fish and Wildlife Coordinating Act, 16 U.S.C. §§ 661-665, and Act of July 23, 1942, 56 Stat. 703].

though non-economic, in environmental protection and preservation of natural resources on the part of responsible individuals or organizations constitutes a sufficient public interest in the result of governmental agency action under a relevant statute (either by express language of the statute itself or under the Administrative Procedure Act) for them to have standing under any currently applied test promulgated by the U.S. Supreme Court.

### B. Absent A Clear Showing Of Contrary Legislative Intent, The Administrative Procedure Act Secures The Right Of Judicial Review For Persons "Aggrieved" By Agency Action.

Under the provisions of the Administrative Procedure Act, 5 U.S.C. §§551 – 706 (and, particularly Sections 701 – 706 thereof), judicial review of governmental agency action is provided for persons "aggrieved" by that action when the particular statutes under consideration did not by their own terms provide for such review and when a judicial review is not specifically foreclosed by an expression of congressional intent that agency determination be final. Section 702 of the Act (5 U.S.C. § 702 – the Administrative Procedure Act will hereafter be referred to as APA) provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Although this section of the APA refers to parties "aggrieved" rather than "aggrieved in fact" (analogous to the "injured in fact" requirement set forth in the *Data Processing* and *Barlow* cases), the legislative history of the APA supports the contention that the words "in

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*Non-Environmental Cases*

*Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) [National Housing Act, 42 U.S.C. §1455(c)]; *Powelton Civic Home Owners Ass'n. v. Dept. of Housing and Urban Development*, 248 F.Supp. 809, 821–828 (E.D. Penn. 1968) [National Housing Act, *supra*]; *Scanwell Laboratories v Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) [Food, Drug and Cosmetic Act, 21 U.S.C. §371(f)(6)]

fact" were implied. The Senate Committee Report, S.Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946), states that "[t]his subsection [§702] confers a right of review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute." [Emphasis added.] Though this exact language did not appear in the statute as finally enacted, the Attorney General of the United States stated that the language of the Senate document was reflective of existing law. *Id.* at 310.[16]

Further supporting the contention that the APA should be given a quite liberal interpretation in favor of those who propose to litigate under its terms is the statement of this Court in the *Barlow v. Collins* decision that it is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. 397 U.S. at 167.[17] Clearly, the APA was designed to apply to those situations not proscribed by the Act itself where a person *aggrieved in fact* seeks judicial review – regardless of a lack of legal right or lack of specific statutory language in some other Act granting judicial review.

Section 701 of the APA (5 U.S.C. §701) enumerates those actions not reviewable and includes those situations [5 U.S.C. §701(a) (1)] where statutes "preclude judicial review" as well as those [5 U.S.C. §701(a) (2)] where "agency action is committed to agency discretion by law." When the

16. The D.C. Circuit Court of Appeals conducted a thorough review of the APA's legislative history which is reported (per Tamm, J.) in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F 2d 859 (D.C. Cir. 1970).

17. This position was stated previously and elaborated upon in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), which see in support of the contention that the Act's "generous review provisions" must be given a "hospitable interpretation." See also: *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962). It must be noted that the government does not concede that the Administrative Procedure Act is jurisdictional and relies upon Section 702 of the Act (5 U.S.C. §702) to support its claim that jurisdiction must be found elsewhere in the "relevant statute." In further support of the claim that the APA is jurisdictional, see Professor Davis' discussion in 4 K.DAVIS, ADMINISTRATIVE LAW TREATISE chapter 28 (1958) and, in particular, §28.08.

6th Circuit Court of Appeals addressed itself to the question of agency discretion in deciding *Knight Newspapers, Inc. v. U.S.*, 395 F.2d 353 (6th Cir. 1968), the court ruled that:

> A court may not review a decision committed to the discretion of an agency pursuant to a permissive type statute, but may do so where the decision was made pursuant to a mandatory type statute even though the latter decision involves some degree of discretion. * * *. 395 F.2d at 358.

Many of the congressional acts relied upon by environmentalists in support of claims of improper agency action contain certain mandatory factors which must be considered in agency action pursuant to those acts – factors which if ignored by an agency will subject its decisions to judicial review.[18] Referring to just such a reliance on the APA to force judicial review of agency action, the decision in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97, 102, (2d Cir. 1970), *cert. denied* 7th Dec. 1970, affirming the district court's grant of jurisdiction, held that:

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18. This is a partial list of Acts of Congress relied upon in support of claims that litigants are "aggrieved by agency action within the meaning of a relevant statute:"

16 U.S.C. § 1 [National Park Service Act]; 16 U.S.C.§§401-466 [Rivers and Harbors Act]; 16 U.S.C.§§528-531 [Multiple Use-Sustained Yield Act]; 16 U.S.C.§§580(m), (n) [conservation guidelines for Corps of Engineers in reservoir development]; 16 U.S.C. §§ 661-668 [Fish and Wildlife Coordinating Act]; 16 U.S.C. § 695(k) [Migratory Waterfowl Act]; 16 U.S.C. §§ 701 *et seq.* [Migratory Bird Act]; 16 U.S.C. §§ 757(a)-757(f) [Anadromous Fish Act]; 16 U.S.C. §§ 760(a)-760(g) [Migratory Game Fish Act]; 16 U.S.C. §§ 803(a) *et seq.* [Federal Power Act]; 16 U.S.C. §§ 1131 *et seq.* [Wilderness Act]; 16 U.S.C. § 1271 [Wild and Scenic Rivers Act]; 23 U.S.C. § 138 [Federal Aid Highway Act]; 33 U.S.C. § 540 [Rivers and Harbors Act]; 42 U.S.C. §§ 2012-2013 [Atomic Energy Act]; 42 U.S.C.§§4321-4347 [National Environmental Policy Act]; 49 U.S.C. §§ 1651(b)(2) 1653(f) [Department of Transportation Act].

> There can be no question at this late date that Congress intended by the Administrative Procedure Act to assure comprehensive review of a "broad spectrum of administrative actions," including those made reviewable by specific statutes without adequate review provisions as well as for those for which no review is available under any other statute. *Abbott Laboratories v. Gardner*, [387 U.S. 136 (1967)] at 140; *see* S.Rep. No. 752, 79th Cong. 1st Sess., 26 (1945); H.R.Rep. No. 1980, 79th Cong. 2d Sess., 41 (1946).

Quite recently, this Court was called upon to consider the scope of the APA as a means of providing judicial review of acts of the Federal Highway Administrator in *Citizens to Preserve Overton Park v. Volpe*.__U.S.__, 91 S.Ct. 814 (1971), and found that the "threshold question — whether petitioners are entitled to any judicial review — is easily answered." 91 S.Ct. at 820. After reviewing the provisions of the APA, some of its legislative history, and the challenged actions of the Secretary of Transportation, the Court concluded that judicial review was clearly available to the petitioners. Although standing was not an issue in this instance, it should be noted that action was brought by a citizens organization, individuals, and *a conservation group*.

Since Congress has manifested its intent that the APA act as a grant of federal court jurisdiction to review statutes which do not contain their own review provisions, there must likewise be a manifestation of congressional intent in the APA to confer standing upon those environmental litigants, representing the public interest, who allege they are aggrieved because environmental provisions of a federal statute were not properly considered by some governmental agency. Since the 9th Circuit does not agree with this conclusion [*Sierra Club v. Hickel*, 433 F.2d 24, 29-30 (9th Cir. 1970)], we concur with Professor Davis and respectfully urge the Court to take this opportunity to make a full-scale inquiry into the legislative history of the Administrative Procedure Act's jurisdictional provisions as they relate to the

standing of environmental litigants to initiate judicial review proceedings in the public interest.[19]

## III. THE NINTH CIRCUIT'S BASIC CONCEPT OF STANDING IS CONTRARY TO THE CURRENT LAW AS FORMULATED BY THIS COURT.

### A. It Is Well Established That The "Injury In Fact" Suffered By A Litigant Need Not In Any Way Be Economic.

Throughout the Circuit Court's reasoning, as announced in *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), there is evidence of a mistaken notion of what the two-step test announced in *Data Processing* and *Barlow* has meant to the law of standing. By these cases, as well as many others, it is well established that the "injury in fact" suffered by a plaintiff need not in any way be economic. Yet, the reasoning by the Circuit Court is preoccupied with finding some economic or proprietary interest in terms of present case law which will suffice to explain their *Sierra Club* decision in economic terms. This reasoning, we submit, is clearly erroneous.

The following cases were distinguished in order to deny standing to the Sierra Club - who, admittedly, has no economic interest at stake in the suit:

1. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), was held inapposite because the statute under which that action was brought contained a specific right of judicial review therein for "aggrieved" parties – and several petitioners (the Towns) who joined in the action had "sufficient actual economic interest" (433 F.2d at 30) in their own right to obtain standing. Since the Sierra Club did not have a

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19. Davis, The Liberalized Law of Standing, 37 U.CHI. L.REV. 450, 462 (1970). See Also: *Allen, The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U.COLO.L REV. 96(1969); Heiser, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAWYER ___ (1971).

specific right to judicial review manifested in the statutes under which it litigated, and because it had not joined local property owners, it was denied standing.

2. The 9th Circuit pointed out that in *Parker v. U.S.*, 307 F.Supp. 685 (D. Colo. 1969), and *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert. denied* 400 U.S. 949 (1970), the Sierra Club obtained standing primarily because it joined with local residents and users, but that in the present case the Sierra Club failed to join "persons or organizations with a direct and obvious interest" (433 F.2d at 33). Why is this joinder necessary? Each party maintaining an action should assert a sufficient interest to be granted standing in his own behalf. By the 9th Circuit's reasoning, some tangible economic interest must be shown by one of the parties to obtain standing. We submit that this is not the present state of the law.

3. In analogizing *Powelton Civic Homeowners Ass'n. v. Department of HUD*, 284 F.Supp. 809 (E.D. Penn. 1968), to the *Sierra Club* case, the majority said "if the homes of residents at Mineral King were to be razed and those homeowners objected" (433 F.2d at 31) there would then be standing for those petitioners – again raising an economic interest "test" for standing.

4. The Circuit Court pointed out that *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), was a consumer case and that *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), was a competitor's suit. The court attempted to reconcile their decisions on standing by pointing out that the direct injury in fact alleged in both cases was somehow proprietary or economic. This notion is understandable, but contrary to the decisions in *Data Processing* and *Barlow* which clearly recognize that injury to economic interests does not furnish the sole basis for standing.

Traditionally, courts could be assured that the adverseness necessary for a case and controversy would be present if some economic interest were at stake in the litigation.

Seemingly, the 9th Circuit is reluctant to acknowledge the fact that many people and organizations today are motivated as much by concern for public welfare as by their own economic interests. This change in motivation has been recognized by most courts and may be evidenced by the recent liberalization in the law of standing.

Judge Trask's opinion for the majority in another recent 9th Circuit case, *Alameda Conservation Association v. California*, __F.2d__, Civ. No. 22,961 (9th Cir., *decided* 19th Jan. 1971), 2 ERC 1175, is particularly elucidating (since Judge Trask also wrote the majority opinion in the *Sierra Club* case). In the *Alameda* case there were three separate opinions just on the issue of standing. It seems that the substitution of Judge Merrill (who was on the bench in the *Alameda* case) for Judge Kilkenny (who was on the bench in the *Sierra Club* case) resulted in a decision which took a more liberal position on standing (2 ERC at 1177 *et seq.*) than did *Sierra Club*. The law of standing should be capable of a more uniform expression!

In the *Alameda* case, an association of San Francisco area citizens sought to enjoin the continued filling of San Francisco Bay. Judge Trask was willing to grant standing only to those landowners who were proximate users of the Bay – those whose land touched the Bay. Because the Association itself did not own any land bordering the Bay, "it simply [was] not hurt in any practical way which entitled it to call upon the courts for redress or protection." 2 ERC at 1177. Under this rationale, only those landowners whose land bordered on a national park would have standing to pursue their grievances in court. But, in a very real sense, the public, the Nation, is the "local property owner" in our National Parks and National Forests - and, thus, one who asserts the public interest should have standing to litigate issues concerning their use. Judge Trask continues:

> If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it; if its physical

> surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an intereference with that operation would establish standing. 2 ERC at 1177-1178.

Even this recognition that aesthetic, conservational and recreational interests may establish standing hinges upon whether the plaintiff owns property or not or would suffer some form of economic loss to its facilities. As enunciated by this United States Supreme Court, the current test for standing does *not* require that some economic injury be shown in order to be granted standing.

**B. If The General Intent Of Congress, Expressed In Any Statute, Is To Protect A Particular Interest, Those Parties Who Assert Injury To The Protected Interest Should Have Standing To Bring Action Under That Statute.**

Perhaps the reason the 9th Circuit misapplied the second part of the *Data Processing* and *Barlow* test for standing was because it obtained its "basic concept of standing" (433 F.2d at 28) from a 1943 decision, *Associated Industries v. Ickes*, 134 F.2d 694, 700 (2d Cir. 1943). That case held that some private substantive legally protected interest must be involved before the court could grant standing. This type of test, however, has been soundly discredited by the new U.S. Supreme Court two-step test as well as by the 2d Circuit's more recent decisions in such cases as *Scenic Hudson* and others. In attempting to apply the second part of the current test for standing, the Circuit Court should have asked: Does the statutory provision authorizing administrative action compel consideration of the public interest? [Allen, 41 U. COLO. L. REV. at 98.] If this intent to protect is present, the public – or one asserting the public interest – has the right to bring suit. The *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) case

is a good example of how this test is applied. Here, Negro and Puerto Rican citizens, displaced by urban renewal, sued the local redevelopment agency and HUD. They based their claim on the Housing Act of 1949 [42 U.S.C. §§ 1441-1460] which provided that displaced tenants were entitled to decent relocation housing. The language in the Act was general, but its clear intent was to protect the persons who might be adversely affected by urban renewal.

Embodied in the Acts establishing the Sequoia National Park [16 U.S.C. §43] and Sequoia National Game Refuge [16 U.S.C. §688], too, is general language the purpose of which is to assure that these lands will be protected for the public. Such an intent to protect America's natural heritage is clearly present not only in these Acts, but in most other Acts of Congress as well. As Judge Hamley pointed out in his concurring opinion, 433 F.2d at 28, the Sierra Club has brought this action at bar on behalf of thousands of members who share a deep interest in the conservational and aesthetic values which Congress intended to be safeguarded by the statutes in question and the regulations and practices conducted under them. Clearly, the interests the Sierra Club seeks to protect are the same interests that Congress meant to protect when it set aside lands in the public domain. The fact that the Sierra Club, which has such a long history of devotion to the field of conservation, and others are denied the right to challenge governmental agency action with regard to lands within the 9th Circuit's jurisdiction is especially frightening when one considers how much federal land lies within the 9th Circuit. More than sixty-eight percent of the total land within the 9th Circuit is federally-owned; and more than seventy-eight percent of *all* federally-owned land in the United States is in the 9th Circuit.[20] It is vital that those who assert the public's

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20. The total land area of all states in the 9th Circuit's jurisdiction amounts to 863,242,880 acres. The total amount of federally-owned land in those 9th Circuit states amounts to 592,669,690 acres or 68.66% of the total land. The total amount of federally-owned land in the United States is 755,368,055 acres. 78.46% of *all* federally-owned land in

interest in the protection of these lands be allowed access to the courts. Though challenge of federal agency action in the more receptive D.C. Circuit, a kind of "forum -shopping," is an alternative, it is not a proper remedy for the 9th Circuit's denial of standing to environmental litigants.

## CONCLUSION

For the foregoing reasons we respectfully urge that the judgment of the court below on standing be reversed.

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MAY, 1971.

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the U.S. is in the 9th Circuit. Source: Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress*, Appendix F at 327 (June 1970).